(28,337)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 382.

CHARLES McKELVEY, CHARLES WARREN, E. J. BATES, ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1–5 In the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. Bates, Rudolph Lehman, and Emmett Donahue, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

TRANSCRIPT OF THE RECORD.

Upon Writ of Error from the United States District Court for the District of Idaho, Eastern Division.

6 *Names and Addresses of Attorneys of Record.*

J. M. Stevens,
Pocatello, Idaho;
Chase A. Clark,
Solon B. Clark,
Mackay, Idaho,
Attorneys for Plaintiffs in Error.

J. L. McClear,
United States District Attorney, for the District of Idaho;
J. R. Smead,
Assistant U. S. Attorney, Boise, Idaho,
Attorneys for Defendant in Error.

7 In the District Court of the United States in and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA

vs.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, and EMMETT DONAHUE, Defendants.

Indictment.

Charge: Obstruction of Occupancy and Travel on Public Lands. Violation Act of February 25, 1885, 23 Stat. 322.

The Grand Jurors of the United States of America, being first duly impaneled and sworn, within and for the District of Idaho, Eastern Division, in the name and by the authority of the United States of America, upon their oaths do find and present:

That heretofore, to wit: On or about the 26th day of August, 1919, in Custer County, State of Idaho, and in the Eastern Division of the District of Idaho, at a point about ten miles northwest of the town of Mackay in said County, Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue did wilfully and unlawfully by means of force, threats, intimidation, and other unlawful means, prevent and ob-
8 struct certain persons, to wit: Peter Iphar, Bert Etchart and John Mallea, from having and enjoying free passage over and through certain public, unoccupied lands of the United States of America, to wit: those lands which are and will be included in Townships seven (7) and eight (8) North, Range twenty-two (22) East, Boise Meridian, which said townships were then and there, and are now, in part surveyed and in part unsurveyed, in the manner following to wit: that they, the said Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue did then and there forcibly and unlawfully make an assault with fire arms, the same consisting of guns, pistols and revolvers, a more particular description of which is to this grand jury unknown, upon the said Peter Iphar, Bert Etchart and John Mallea, who were then and there attempting peaceably to pass over and through the said aforesaid public lands of the United States, and did then and there threaten to injure the said Peter Iphar, Bert Etchart and John Mallea if they should not then and there desist in passing and attempting to pass over and through said public lands, and did then and there likewise threaten the said Peter Iphar, Bert Etchart and John Mallea if they should attempt again to pass over and through said public lands or should endeavor again to go upon said public lands, all of which things were done by and on
9 the part of said defendants, and each of them, for the purpose of preventing and obstructing the said Peter Iphar, Bert Etchart and John Mallea from passing over and through the said public lands, and by means of which said forcible assaults and threats the said Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue, and each of them, did then and there intimidate the said Peter Iphar, Bert Etchart and John Mallea, and did then and there force them to desist from passing on, over and through said public lands, and by which means and acts aforesaid the said Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue, and each of them, did then and there prevent and obstruct free passage over and through the aforesaid public lands by the said Peter Iphar, Bert Etchart and John Mallea at the time and place first aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. L. McCLEAR,
United States Attorney for the District of Idaho.

W. H. WATSON,
Foreman of the United States Grand Jury.

Witnesses examined before the grand jury in the above case:

10 Henry Larter, C. R. Clute, F. W. Cummins, Mrs. Jessie M. Motts, H. B. Thompson, Pierre Iphar, John Mallea.

Endorsed: Filed March 10, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Motion to Dismiss.

Comes now the defendants and move the Court to dismiss and quash the indictment herein for the following reasons and upon the following grounds:

I.

That the said indictment and matters and facts therein contained in manner and form, as the same are stated, do not constitute a crime against the laws of the United States of America.

II.

That the said indictment, and the matters and facts therein contained, in manner and form as the same are stated, are not direct and certain.

III.

That the above entitled Court is without jurisdiction of the offense set out in the indictment on file herein.

11 J. M. STEVENS,
Attorney for Defendants.

Residence and Post Office Address, Pocatello, Idaho.

CHASE A. CLARK,
SOLON B. CLARK,
Attorneys for Defendants.

Residence and Post Office Address, Mackay, Idaho.

Endorsed: Filed Oct. 11, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Demurrer.

Comes now the defendants and demur, to the indictment on file herein, and for ground of demurrer allege:

I.

That the said indictment and matters and facts therein contained in manner and form, as the same are stated, do not constitute a crime against the laws of the United States of America.

II.

That the said indictment, and the matters and facts therein contained, in manner and form, as the same are stated, are not direct and certain.

III.

That the above entitled Court is without jurisdiction of the offense set out in the indictment on file herein.

12

J. M. STEVENS,
Attorney for Defendants.

Residence and Post Office Address, Pocatello, Idaho.

CHAS. A. CLARK,
SOLON B. CLARK,
Attorneys for Defendants.

Residence and Post office Address, Mackay, Idaho.

Endorsed: Filed Oct. 11, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Minute Entry of Oct. 11, 1920.

The demurrer to the indictment and motion to dismiss the indictment were argued before the Court by Chase Clark, Esq., on the part of the defendants, and J. R. Smead, Assistant District Attorney, on the part of the United States. The matter was continued to ten o'clock A. M. October 12th, 1920.

(Title of Court and Cause.)

Minute Entry of Oct. 12, 1920.

The Court at this time announced his decision denying the motion to dismiss, and overruling the demurrer to the indictment, to which ruling defendants were allowed exceptions.

13 (Title of Court and Cause.)

Minute Entry of Oct. 13, 1920.

Comes now the defendants through their counsel Chase Clark, Esq., and waive the reading of the indictment on the part of each of the defendants, and for each defendant entered a plea of not guilty. On motion of the District Attorney, it was ordered that the order setting the cause for trial be, and the same is hereby vacated.

(Title of Court and Cause.)

Minute Entry of Oct. 15, 1920.

This cause came regularly on for trial before the Court and a jury, J. R. Smead, Assistant District Attorney appearing for the United States, and Messrs. Chase Clark, J. M. Stevens and Solon B. Clark, appearing as counsel for the defendants. All of the defendants being present, the clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury for the trial of this cause. David P. Jones, whose name was drawn from the jury box, was excused by the Court for cause; Joe Davidson, Davis E. Davis, and James A. Kerr, whose names were drawn from the jury box, who were sworn on voir dire, were excused by the Court on the plaintiff's peremptory challenge; Leven H. Benson, Colin H. Chester and Alfred Ball, whose names were drawn from the jury box
14 who were sworn on voir dire, examined and passed for cause, were excused by the Court upon the defendants' peremptory challenge; The names in the jury box having been exhausted, the Marshal on venire issued on order of the Court, summoned from bystanders the following named persons, whose names were placed in the box, to-wit: J. H. Kedney, R. H. Faris, F. C. Powell, C. S. Calloway, J. Morris, and C. L. Hastings. R. N. Farris, F. C. Powell and J. Morris, whose names were drawn from the jury box, were sworn on voir dire, examined by counsel and excused by the Court for cause. Following are the names of the persons whose names were drawn from the jury box, who were sworn on voir dire, examined and accepted by counsel for the respective parties, to-wit: Fred Anderson, D. C. Devaney, James Bergensen, David Crystal, John J. Chehey, Fred Beuhler, George J. Wernette, George Dewey, James M. Cook, J. H. Kedney, C. S. Calloway and C. L. Hastings.

The indictment was read to the jury by the Assistant District Attorney, who informed them of the plea of the defendants entered thereto. Whereupon Peter Iphar, Henry Larter, John Mallea, and John Mascho w-re sworn and examined as witnesses and John Laude was sworn as an interpreter on the part of the plaintiff.

Whereupon the Court, after admonishing the jury, excused
15 them until 9:30 o'clock A. M. October 16th, 1920, continuing further trial herein until that time.

(Title of Court and Cause.)

Minute Entry of Oct. 16, 1920.

This cause came on for further trial before the Court and jury, the Assistant District Attorney, the defendants and their counsel being present, the jury was called and all found present. Ben R. Gray was sworn and examined and Henry Larter and Peter Iphar were recalled and further examined as witnesses on the part of the United States, and here the plaintiff rests.

The defendants here moves the Court for a judgment of non-suit, which motion was denied by the Court, after hearing counsel, without the presence of the jury.

The jury returned into Court, whereupon, Emmett Donohue, Milford Vaught, Thomas Donohue, Will Criswell, Charlie Warren, Audry Fulmer, Ed. Hemmerly, E. J. Bates and Rudolph Lehman were sworn and examined as witnesses on the part of the defendants.

Whereupon the Court excused the jury till 9:30 o'clock A. M. October 18th, 1920, and continued further trial herein until that time.

16 (Title of Court and Cause.)

Minute Entry of Oct. 18, 1920.

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, the jury was called and all found present. George Rosencrans, W. I. Neilson, Van Clark, Clay Vance, A. B. Read, Carl Lehman, Claude Vaught, Lee Pence, Charles C. Davidson, A. D. Streeter, Robert Parsons, John Howell, Charles Howell, Charles Baker, Dr. N. H. Farrell and George Morgan were sworn and examined and Milford Vaught, Emmett Donohue and E. L. Bates were recalled and further examined as witnesses on the part of the defendants, and the defendants here rest.

On rebuttal W. C. Hunter, George Nowaski, Robert Kent, George Hanna, Elmer Fry, Peter Bidegain, William Jones, J. M. Warnek, Henry Thompson and Mrs. Mary Mott, were sworn and examined on the part of the plaintiff.

On sur-rebuttal, George Rosecrans, Milford Vaught, and Rudolph Lehman were recalled and further examined, and here both sides close.

Counsel for the government moved the Court to dismiss the action as to the defendant Thomas Donohue, which motion was granted by the Court.

The defendants, through their counsel, here moves the Court to instruct the jury to return a verdict of not guilty, which motion was denied by the Court. The cause was argued before the jury

17 by counsel for the respective parties, after which, the Court delivered his instructions to the jury, then placed them in

charge of Mike O'Brien, a bailiff duly sworn, and they retired to consider of their verdict.

The Marshal was ordered to provide dinner for the jury at the expense of the United States.

On the same day the jury returned into Court, counsel for the respective parties being present, whereupon, on request of the jury, portions of the testimony were read to them, after which they again retired to consider of their verdict.

The jury again returned into Court, counsel for the respective parties being present, whereupon, the Court asked them if they had agreed upon a verdict and they, through their foreman, replied that they had, and thereupon presented to the Court their written verdict, which was in the words following, to-wit:

"In the District Court of the United States for the District of Idaho, Eastern Division.

Cause No. 591.

UNITED STATES OF AMERICA

vs.

CHARLES MCKELVEY, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, EMMETT DONOHUE and THOMAS DONOHUE, Defendants.

Verdict.

18 We, the jury in the above entitled cause, find all of the defendants above named, except Thomas Donohue, guilty; and said Thomas Donohue, we find not guilty.

GEORGE J. WERNETTE,
Foreman."

The verdict was recorded in the presence of the jury, then read to them, and they each confirmed the same. The defendants were allowed exceptions to the verdict, whereupon, the Court discharged the jury, and excused the members thereon till ten o'clock A. M. October 19th, 1920.

(Title of Court and Cause.)

Motion in Arrest of Judgment.

Now comes the defendants and move in arrest of judgment in the above entitled matter, and for ground of motion allege:

1. That the indictment on file herein and matters and facts therein contained in manner and form as the same are stated, do not constitute a crime against the laws of the United States of America.

2. That the said indictment and the matters and facts therein contained in manner and form as the same are stated, are not direct and certain.

3. That the above entitled Court is without jurisdiction of the offense set out in the indictment on file herein.

19 4. That that portion of Section 4998, U. S. Statute under which the defendants herein were indicted to-wit: "Or shall prevent or obstruct free passage or transit over or thru the public lands" is unconstitutional and void.

5. That said Section 4998, U. S. Statute under which this indictment is brought does not provide or make it unlawful for the obstruction of persons by force, threats, or intimidation as alleged in the indictment from free passage or transit over or thru the public land.

6. That there is a variance between the indictment in this action and the evidence introduced herein in this:

(*a*) The indictment charges the prevention and obstruction of certain persons from free passage and transit over the public lands, and the evidence shows that the obstruction, if any there was, was directed against certain sheep and not against the persons alleged to have been obstructed in said indictment.

(*b*) The indictment charges the prevention and obstruction of free passage and transit over certain public lands, to-wit: Townships 7 and 8, North Range 22 East, Boise Meridian, and the evidence shows that said townships 7 and 8 North Range 22 East B. M., are not public lands as a whole, but only certain portions thereof are public lands.

20 (*c*) That the evidence introduced on behalf of the Government does not show or tend to show the commission of any crime against the laws of the United States of America on the part of the defendants or any or either of them.

(*d*) That the evidence introduced as a whole does not show the commission of any crime against the laws of the United States of America on the part of the defendants or any, or either of them.

(*e*) That the evidence introduced herein on behalf of the Government does not show or tend to show, the commission of any crime within the jurisdiction of this Court.

(*f*) That the evidence as a whole shows by great preponderance of the evidence, that the lands in question were a cattle range as provided and defined by Section 8333, Idaho Compiled Statutes, and that the persons named in the said indictment against whom the said defendants are alleged to have acted, were upon said lands in violation of said Section 8333, Idaho Compiled Statutes.

(*g*) That the verdict is contrary to law as given to the jury by the Court in this:

That the Court instructed the jury, if the range in question was a cattle range and the persons alleged to have been prevented from free passage and transit over the same were herding, grazing and pasturing their sheep on said range, then the jury should find the defendants not guilty, when the evidence taken as a whole
21 proved by a great preponderance of the evidence that said range was a cattle range.

(*h*) That the Court erred in admitting Government's Exhibit "A" which is a township plat of townships 7 and 8 North Range 22 East B. M., over the objection of the defendants in that said plat showed that townships 7 and 8 North Range 22 East B. M. were not as a whole public lands.

(*i*) That the verdict rendered herein is contrary to the evidence.

Wherefore, the defendants pray the entitled Court to vacate and set aside the verdict of the jury rendered herein, and that the judgment be arrested and that the defendants herein be dismissed.

J. M. STEVENS,
Attorney for Defendants.

Residence and Post Office Address, Pocatello, Idaho.

CHASE A. CLARK,
SOLON B. CLARK,
Attorneys for Defendants.

Residence and Post Office Address, Mackay, Idaho.

Endorsed: Filed Oct. 11, 1920, W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Minute Entry of Nov. 19, 1920.

Comes now the District Attorney, with the defendants and
22 their counsel, into Court, whereupon the defendants, through their counsel, move the Court to arrest judgment in this cause, which motion the Court denied.

The Court thereupon asked each of the defendants, Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donohue, if he had any legal cause to show why judgment should not be pronounced against him, the said defendants having no cause, and no sufficient cause appearing to the Court, it was announced to be the judgment of this Court that the defendants each pay a fine of $1,000.00.

(Title of Court and Cause.)

Judgment.

Now, On this 19th day of October, 1920, the United States District Attorney, with the defendants and their counsel, Messrs, Chase Clark, J. M. Stevens and Solon B. Clark, came into Court; the defendants *was* duly informed by the Court of the nature of the indictment found against them for the crime of Obstruction of Occupancy and Travel on Public Lands committed on the 26th day of August, A. D. 1919, of their arraignment and plea of not guilty, of their trial and the verdict of the jury on the 18th day of October, A. D. 1920, "Guilty as charged in the indictment." The defendants were then asked by the Court if they had any legal cause to
23 show why judgment should not be pronounced against them, to which they each replied that he had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendant- having been convicted of the crime of Obstruction of Occupancy and Travel on Public Lands.

It is hereby considered and adjudged that the said defendants, Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donohue, each do pay *at* fine of One Thousand ($1,000.00) Dollars.

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated by and between J. L. McClear, United States District Attorney for the District of Idaho, Attorney for the above named plaintiff; and J. M. Stevens, Chase A. Clark and Solon B. Clark, attorneys for the above named defendants, that the said attorneys for the defendants may have 65 days from the 19th day of October, 1920, within which to prepare, settle and file a bill of exceptions to be used on a review of the above entitled cause.

J. L. McCLEAR AND
J. R. SMEAD,
United States District Attorney
for the District of Idaho and Asst. Attorney,
Attorneys for the Plaintiff.

24

J. M. STEVENS,
Residing at Pocatello, Idaho;
CHASE A. CLARK,
SOLON B. CLARK,
Residing at Mackay, Idaho,
Attorneys for Defendants.

Approved:
FRANK S. DIETRICH, *Judge.*

October 19th, 1920.

Endorsed: Filed Oct. 19, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Stipulation for the Settling, Allowance, and Filing of Bill of Exceptions.

It is hereby stipulated by and between counsel of record for the above-named defendants, that the Bill of Exceptions prepared by counsel for the above-named defendant-, and served on counsel for the above-named plaintiff may be by the Court settled, allowed, certified and filed as amended by law and the rules of said Court, required, as the defendant's Bill of Exceptions in the above entitled cause.

Dated this the 6th day of December, 1920.

J. L. McCLEAR,
United States District Attorney, District of Idaho;
25 J. R. SMEAD,
Assistant United States District Attorney, District of Idaho;
CHASE A. CLARK,
SOLON B. CLARK,
Attorneys for Defendants.

Endorsed: Filed Dec. 10, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Bill of Exceptions.

Be it remembered, that on the trial of this cause, in the above entitled Court, at the October, 1920, term of said Court, the Honorable F. S. Dietrich, presiding, *when* the following proceedings were had, to-wit:

The jury was impanelled and sworn according to law, and thereupon the following proceedings were had:

The plaintiff to sustain the issue upon its part, among others, offered the following testimony of the following witnesses as evidence in chief.

PETER IPHAR, called as a witness, on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Peter Iphar, at the present time I live in Pocatello, but my home is in Utah. I was born in France, and have been in this country eight years, am a citizen of the United States. I know Charles McKelvey, Thomas Donahue, Charles Warren, E. J.
26 Bates, Rudolph Lehman, and Emmett Donahue. I have been up in Custer County, in the State of Idaho, and the vicinity of Mackay. Was there quite a few different times. The last time I was up there was in July, 1919, when I went to work for

Mr. Bidegain and Etchecacher, and worked for them about one month, tending camp for sheep. There were other men associated with me in the work, Mr. John Mallea and Bert Etchart. John Moscho and Ramon Gomeze, and two other fellows, were working for the same people at that time with other bands of sheep. I don't know where Ramon Gomeze or Etchart are. John Mallea is in this court. When I was employed for these people we went to Twin Bridges, that is northwest of the town of Mackay about 30 miles. That is where I first went to work, and it is on the right hand side of the river. It was in July that I started up there. We did not stay there, we got orders to move down, so we started down the desert. We were going further away from Mackay, at that time, but in the direction of Mackay. I seen the men you have asked me about, McKelvey, Warren, Donahue, Bates and Lehman in the latter part of August, 1919, while I was still with those sheep. At the time I seen them, I was about 8 or 10 miles from the town of Mackay, I judge. This was on the morning of the 25th day of August. They come up to the herder, Bert Etchart first. I was coming down with the camp, to the place where he was, when
27 they first come up. The men that came there at that time were Rudolph Lehman, Charley Warren, and the Vaught boy. I had a talk with them there ot that time. They told me that we would have to move the sheep away. At that time there was nobody there, except myself and the herder, and these three men. This was at 11 o'clock on the morning of the 25th day of August. They told me that we would have to move the sheep away, that it was a cattle range, and go across the river on the other side on the main highway. We were not close to the river at that time, but about a mile and a half on the left hand side of Big Lost River, coming down toward Mackay. They wanted us to move across to the highway, which is a public road. I told them that it was kind of warm, and we couldn't move them until it gets a little cooler, and we had to get orders from Mr. Bidegain and John Etchecacher, to cross the river, and to go on the other side of the highway, so they pointed me out a place where I could stop for noon, until it got a little cooler, to move on, so we stopped there for noon. That was all the conversation that I had with them on the 25th. They told me that they had the first band across the river already, they made it with Mr. John Moscho. That was Bidegain and Etchacacher's sheep. That was the first that I saw about moving the sheep. On the same day in the afternoon, Mr. Bates and a couple of other fellows come in, and they told us it was time for
28 the sheep to move. It was about four o'clock then. Mr. Bates is one of the defendants here. Of the other six men named in this case, one of them was present, Mr. Emmett Donahue. It was at the place where we stopped for noon with the sheep, it was about four o'clock. There were three others present at this time, Mr. Bates, Emmett Donahue and another one. I don't know who. With me there was Bert Etchart, and then come Mr. John Mallea, he came while these three men were there. H came with Bates and the other two fellows. At that time Mr. Bates told me that we would have to move the sheep and Mr. John Mallea went to town

and got orders to wait until Mr. John Etchacacher came to move them. Mr. John Mallea said not to move until Mr. John Etchacacher come. Our conversation with these three men, Mr. Bates, Mr. Donahue and the other man. I told Mr. Bates we couldn't move the sheep because we got orders to wait until Mr. John Etchacacher come, and Mr. Bates got mad. We were going to the desert with these sheep, if we got to the desert from the point where we were we had to go on the side I was on, because it was impossible to go on the other side. They told us to go on the other side of the river. Mr. Bates told me to move the sheep right away, and I told him I had to wait for the orders to move them, couldn't move until he come. He was supposed to come about 5 o'clock, Mr. Etchecacher, and so he wait a little while, and he got sore, and told the
29 other fellows who were with him, to line up, and so they stood there with their rifles, and then he come up to Mr. John Mallea, and run him around a tree with his fist set. This was Mr. Bates. Then he run him about there and tell us that he make us move, so I didn't say nothing, and Mr. John Etchecacher wasn't coming yet, so I took my horse, and went out to look for him, and went around trying to find him and telephone him, if he was at Mackay, and trying to get him and see what we had to do, so I didn't get him, and I come back. By that time the herder was scared, you know, and the sheep was scattered all over the range. This was on the 25th. Mr. Bates and the men with him were there when I got there. They were going down the road. They did not say anything to me at that time. One fellow spoke up and said, that they didn't want to come into any row, that they didn't have to, but that you have to move them sheep right away. I couldn't tell the name of the man who said this. I know the man well, he is here. It was not any of the six men who are named as defendants in this case, but Mr. Bates and Mr. Donahue were with him when he said that. I saw them again on that date. Mr. John Etchecacher come about half past five, or six o'clock, but I did not see any more of any of the defendants on that day, the 25th.

On August 26th about half past seven in the morning, was the first I see them. Mr. Bates came to my camp. He was alone
30 then. Our camp was at the same place we had the talk with Mr. Bates and Mr. Donahue the day before. Mr. Bates come there and asked me if we were going to move the sheep, and I told him yes, we were, and he told me which way we were going, and I told him toward the old trail, the trail we always used, and we had orders to go through there, and so Mr. Bates said, you can't go through there.

Well, I said, if I can't go through there, you can take charge of the sheep. I said to him, we had orders to go through that old trail, so Mr. Bates said, you can't go through there, so I told him, Well I wouldn't have nothing to do with the sheep, if I couldn't go through there, I had orders to go through there, and so he got sore, and told me, something will happen to you this morning, so he said, are you willing to take the consequences? So, I said, I don't know what you mean by consequences. Well, he said, you know something

will happen to you this morning. There was nobody with me at this time, and Mr. Bates was alone. John Mallea was after his horse, and the herder was after his sheep. A little later, I went after horses to move the camp, and met four fellows on the way, Tom Donahue and three other fellows. I know them, I can point them out. They were three of the other fellows named as defendants here. Their name is here, only one fellow's name ain't there. Thomas
31 Donahue, Emmett Donahue, was not there at that time. McKelvey was there, Bates was not there at that time, Rudolph Lehman was not there. Of the defendants there was Thomas Donahue, Charles McKelvey, and Charles Warren, and another fellow there. This was about half past seven, half an hour after.

Mr. Bates had been at our camp. I had a talk with those people at that time. They asked me where the herder was, and I told them I didn't know. I says, he went after the sheep.

I asked him what he wanted. They say they wanted to get them off, so I told him, he was with the sheep. I didn't know where he was. He was supposed to trail them down. There was nothing else said in particular at that time, I went after the horses and they come along with me, and herded me around until I got the horses, when I brought the horses to camp. They did not come back to camp with me. They come back about half way and then I went alone to the camp with Mr. John Mallea. I met him up there with the horse. Bert Etchart was the herder. When I got through feeding the horses, they came on the lope there and scared the horses away from the camp, five of them, Emmett Donahue, the Vaught boy, Thomas Donahue and Charles McKelvey and another man. He is right here in court, I don't know his name. Mr. Bates was not there at that time, or Mr. Lehman, they came into camp, and scared the horses away, they were eating, and tell us to hold our hands
32 up, and so we did, by us, I mean, myself, John Mallea, and Bert Etchart. We were all three in camp. Bert Etchart just came from the sheep, and tell me that the cow men had the sheep, and were driving them down. These men who came there and told us to put up our hands were armed, they started to shooting right off, they had a rifle and pistol and revolver. All of them armed, some of them had two. And he said, hands up, you dirty sun of a bitch, and they started to shoot right out. I got shot the second time on the left hand side. They were there about a couple of minutes, before I was shot. They fired the guns off twice, they fired two volleys, and neither of the two other boys, Mallea and Etchart got hurt, just me. When I was told to put my hands up, I put them up. After I got shot, I laid down with the pain, and Emmett Donahue got off his horse, and had his pistol in his hand yet, and he put it on my forehead and was going to finish me up, he said, I should finish you up, he say. He didn't do it. Then after he got through comes Bates, and he came in there and got hold of the camp shovel and was going to hit me with that. He told me to get up and pack up, and I told him I couldn't do it, and he said get up, and the rest of the fellows told him I was wounded. He says, he is all right then, if I was wounded. I was on the ground there five or six minutes. After

that, Rudolph Lehman came next, and he put his fist against my face, and made a threat at me, he said, I put him in trouble,
33 says I ought to have been killed. I told them I was kind of sick, and they asked me if I could ride a horse, and I told them no, I couldn't ride no horse. Well they says, they went after the car, they had a car ready down about a mile, on the road there, and they wanted me to ride a horse, and rode the horse about 20 feet, they put me on the horse and ride me about 20 feet, and then I couldn't stand it on the horse, so then I walked, to the car an automobile. They took me to the doctor at Mackay, Scott Vaught's boy and Charley McKelvey. Rudolph Lehman was there at the camp after the shooting, he came right after the shooting. Mr. Bates came after the shooting too. Now when Mr. Bates came to me, as I have testified, I told him, we were going down the old trail, the trail was right through the same country, on the same side of the river, in the open country between the ranches and the forest reserve. That old trail is partly on the forest reserve. It is about three miles wide, three or four mile- wide, I think. The ranches I have mentioned are on the north side across the river. The ranches are right on the river, that would be as I went down toward Mackay; it would be on my left. The forest reserve was on the right. The general direction of the old trail was going south toward Mackay, straight down toward Mackay, and goes right up toward Twin Bridges, comes from Mackay up toward Twin Bridges.

34 Cross-examination.

By Mr. Clark:

The first I saw of these defendants was on the 25th day of August. The day before the time I stated I was shot. That was not all the conversation I had on the 25th day of August. I met Milford Vaught, Charles Warren and Mr. Lehman on the morning of the 25th. They were the first of these defendants that I saw. They were the first ones that spoke. They were right close to the sheep.

Q. Did they ride up to where you were, or did you ride up to where they were?

A. I was coming down close to the sheep too.

Q. You rode up to where they were waiting, did you?

A. No, the sheep were going down, and I was following the sheep.

Q. You were going, were you, after?

A. Yes, sir.

Q. And in that moving you came to where they were?

A. Yes, I was close to the sheep, I got to follow the camp.

When I first came up to where these three men were standing, they say to me, that they move the sheep the first day, and they wanted that band of sheep to move out of there. One of them fellows, Lehman, was talking to me, I told him that the boss had told me
35 to go on through there. They did not do anything to stop me from going through on the 25th. I said to him, he wanted us to move the sheep, and I says, it is too hot now we can't move

them, and he said well, you can stop right in here, and then you move them in the afternoon, and I said all right, he show us where to stop, so we did. I want with the camp and I stopped there. They had the herder of Bidegain's sheep there.

Q. They didn't tell you on the 25th that you couldn't go anywhere you wanted to *do*, did they?

A. No sir, they told me we couldn't go through there, we had to go across the river on the highway.

Q. They didn't stop you personally from going anywhere you wanted to, did they?

A. I couldn't go only where the herder was going.

Q. You rode away and went down to the telephone, didn't you, didn't some of the boys ride away and go down to the telephone?

A. That was in the afternoon when I was looking for Mr. Etchecacher.

Q. The only objection which was made to your going anywhere was made to the sheep going, was it not?

A. That is all.

Q. And everything was friendly in all those conversations between you and them, was it not, at that time?

A. Yes, sir.

36 Q. And you were moving the sheep yourself without them telling you to move them, you were moving them out of that country?

A. The herder was moving them.

Q. But they were not holding any gun and making him move the sheep, were they?

A. No, sir; not then.

Q. And everything was friendly?

A. Yes, sir.

Q. It was Charles Warren that said to you, that you didn't need to hurry with the sheep, that it was pretty warm, and that you had better let them shade up there, and go off of this particular land early in the evening?

A. Yes, sir; I don't know which one of the two, Lehman, I think.

Q. So that all you were doing, you were doing of your own free will, there was nobody making you do anything?

A. No.

Q. Did they move the sheep that day?

A. No, sir, they didn't move the sheep.

The Court:

Q. Who move- the sheep?

Mr. Clark:

A. The defendants.

Q. They didn't move them?

A. No, sir.

Q. They rode away?

37 A. The sheep went just a little ways, and staid there.

Q. And they didn't bother you any?

A. No, sir; they wanted us to get out of there, but we couldn't get out of there until Mr. John Etchecahr came.

Q. After you told these men that you would go and phone the boss, and see whether you could move these sheep or not, they left you and left the sheep and went home, didn't they?

A. I don't know where they went.

Q. Q. But they didn't bother you any?

A. No.

Q. And they didn't bother the sheep any?

A. When I seen them first——

Q. Just answer my question. After you told them you were going to phone the boss they never bothered you or the sheep, either one, but they left?

A. They just stopped me from phoning, Mr. Clark. And they come right to where I was going to phone and told me I couldn't use the phone.

Q. Did they bother you at this place where the sheep were, or bother the sheep?

M. Mr. Bates then said to line up there, to the boys, and then——

Q. Where were you when Mr. Bates said to line up. I thought you said you were down at the phone?

A. I went down to phone after that.

Q. I am talking about the time when you went down to
38 phone the boss.

A. Oh! You want to know after that?

Q. What become of these defendants when you went down to phone the boss? Did they leave the sheep and go home, or did they stay there with the sheep?

A. They leave the sheep and went down. I don't know where they did go.

Q. And they didn't come back that day?

A. They come back in the camp again. They met Mr. John Eschesear.

Q. That was down on the flat below the camp, wasn't it?

A. They met him up there, not quite to the sheep camp, but upon the hill.

Q. Where were they going when they met John Etcheaccher?

A. They were going down.

Q. They were leaving the sheep?

A. I think so, I don't know. I was trying to phone.

Q. Then it will be easy for you to answer this question. After you went down to phone these men never came back up to the sheep camp again, did they?

A. I don't know. I couldn't tell until I went to camp, and then I know they didn't come then. But I see them on the way, Mr. Clark, on the hill.

Q. But they never bothered the sheep any or never bothered you any after you told them you would go and phone the boss?
39 A. No.

On the morning of the 26th, we moved the sheep, we were going to move them, the herder went to move them. The first I saw of these defendants was Mr. Bates. I seen four more men up the hill when I went after the horses.

Q. And these four men, the next you saw, were these four men, as they rode into camp and shot you?

A. Those four, but one wasn't there. Emmett Donahue wasn't there of those four.

Q. Who shot you?

A. Emmett Donahue was the closest to me, and he was boasting he shot me, and he didn't think his 38 pistol could kill a man.

Q. He had a 38 pistol?

A. Yes, sir.

Q. And Emmett Donahue was the man that shot you?

A. I think so.

Q. Was he not with those four men that rode up into camp when you were there?

A. No, sir; he come afterwards.

Q. Who got there before Emmett Donahue got there to camp?

A. They come together, those four men, and I met them up the hill, and then I lost them, and then he come with the four men at the camp.

Q. Well now just?

40 A. I don't know where he was.

Q. Who were those four men?

A. It was Charles McKelvey and Tom Donahue, and Vaught and another man, I don't know his name, he is in the Court.

Q. And they rode up to camp?

A. Yes, sir.

Emmett Donahue was with them when they rode up to camp, he come there then. Everybody put up their hands, nobody else get shot but me. Emmett Donahue shot me with his pistol, I think it was him that shot me. I was hit on the left hand side, right back of the shoulder blade, on the left. I was facing Mr. Donahue with my hands up. There was no other conversation except that these men rode up to me and said hands up, and shot me at the same time. Just said hands up and shot at the same time. Milford Vaught went after an automobile to take me to a doctor.

Q. And Emmett Donahue and the other boys got a horse and got you up the hill and took you to the automobile?

A. I walked down the hill.

Q. When you were walking down the hill, they were helping you all they could, weren't they?

A. They were.

Q. And the only reason you walked you said you didn't feel like riding?

A. I couldn't ride.

They brought a car up the hill just as far as they could
41 bring it, an automobile, and they put me *me* in the automobile and hurried me right in town to the doctor.

Q. Who else shot beside Emmett Donahue?

A. It was the Vaught boy and Tom Donahue and Charley McKelvey and another guy.

Q. They all shot, did they?

A. Yes, sir.

Q. Now, Mr. Iphar, was there any time that any of these defendants made any objection to you personally going anywhere you wanted to go, or was all *there* objections made to the sheep?

Mr. Smead: That is objected to as calling for a conclusion of the witness, Your Honor.

The Court: The objection is overruled, you may answer.

Q. Were the objections made to you or to the sheep?

A. Yes, sir; Mr. Donahue told me that, after I was shot and going down the hill, he told me which one should leave the country, him or me.

Q. The only time they made you do anything was after you were shot, and they made you go down the hill to the automobile and to the hospital, and is the only time, all the rest of the time, they were simply objecting as to where the sheep should go?

A. Wasn't they shooting?

A. Yes.

42 A. They were shooting too, weren't they.

Q. Yes, but I say, they were making no objection to where you should go, they were only making objection to where the sheep should go.

A. They were going to take them themselves, the sheep.

Q. The objection was made to you in regard to the sheep, not to where you should go?

A. I don't know.

Redirect examination.

By Mr. Smead:

The day before I was shot, these different men I have named talked to me, they wanted me and the herder to take the sheep across the river, that is what they talked about the 25th. Mr. Bates, says, the first thing he says, you had better take those sheep across the river. I told him the boss didn't want that, we couldn't go until the boss tell us, see. Well, he says, the boss is in town, and you are taking the responsibility, he says. I told him I didn't have an responsibility at all on the sheep. When I told him that I was going to take them through on that side of the river, I tell him who was going to take the sheep on through. I told them they would have to take care of those sheep themselves, I told him I was going through on the same side of the river I was on, which they objected to.

Q. Who was it that was going to take the sheep through, you or them?

A. Them.

43 I follow the sheep you know with the camp, the herder takes the sheep and I follow with the camp.

Recross-examination.

By Mr. Clark:

Q. That objection that they made was to your taking the sheep through at that time, was it not?
A. Yes, sir.

Redirect examination.

By Mr. Smead:

The men who were there at the time I was shot, and the men who came a little later, were Charles McKelvey, Tom Donahue, Emmett Donahue, and Milford Vaught. I think it is Milford, his first name. It is one of the Vaught boys. I know him by sight, and another fellow, he is in Court herein, I don't know his name. Charles Warren was there later that morning after the shooting. Rudolph Lehman and Mr. Bates and two other fellows, came after the shooting. Charles Warren was there after the shooting, and some others.

Q. How long after the shooting was it that Mr. Bates came and Lehman and Warren?
A. Right after the shooting.

Mr. Smead: That is all.
Mr. Clark: That is all.

HENRY LARTER, being produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is Henry Larter, I live fifteen miles above Mackay, and have lived there since '97. My business is farming
44 mostly. I have a ranch there and handle stock. Run cattle on the range there to some extent. I am acquainted with E. J. Bates, one of the defendants in this case. I remember in a general way of some trouble that took place out on the range, not very far from my place in August, 1919. Remember hearing about it. The day before the more serious trouble occurred, I went out on the range with Mr. Bates. I know Pete Iphar by sight. I seen him on this occasion, when I was out with Mr. Bates. I see this man first, Bert Etchart I think that is it. He was one of the men with the sheep there. This was a sheep camp that I went to. By the road it is just about seven and one-half miles from Mackay, on the right hand side of the river, coming to Mackay, from where the sheep were, and about three and one-half miles from the river.

Q. Now you had some conversation there, you gentlemen with Mr. Pete Iphar?
A. Yes, sir; I went up to the camp.
Q. Who did the talking there, yourself, or Mr. Bates, or the other gentleman or all of you?
A. Well, I guess I done most of the talking.

Q. I say, what was it you were discussing?
A. I just asked him to move his sheep off of the range, I asked him if he would.
Q. You asked him to take them where?
A. To move them on the trail.
Q. What trail is that?
45 A. Over on the other side of the river.
Q. You wanted him to take them across the river?
A. Yes, sir.
Q. And you had some talk with him about that at that time?
A. Yes sir.
He said, as near as I can recall, that he would move the sheep, if the boss told him to move the sheep. He said, John Etchecahar was boss. I left the place with Mr. Bates, when I went away. We went away together. I think Tom Donahue was with us at the time when we went up to the camp, and the foreman of Etchecahar's herd, John somebody, John Mallea. There was nobody else in our party, except myself.
Tom Donahue, and Mr. Bates. Mr. Bates did not have anything to say, about the procedure to be followed. After we left the camp that day, he didn't have much to say at all. I do not recollect that he said anything about what ought to be done, about the situation. After we left camp, we talked the matter over, me and Mr. Bates, and we agreed to go to town and have them arrested on the priority range law. Ride to Mackay, and have them arrested on the charge of invading a priority cattle range. This was along about four o'clock, we had this talk, just about to my ranch, about a quarter of a mile at the Springs, we stopped and conversed there,
46 and went down to my ranch, to get an automobile to go to town, and make out the complaint, and as it happened my boy had the automobile away, so we didn't go. Mr. Bates left my ranch then, and said he would go over and see Milford Vaught, and see if he couldn't get him to take us to town, to make out the complaint and have them arrested. That was the last conversation. That was all I seen of Mr. Bates or any of the men at all for several days. This was the day before the trouble happened on the 25th of August.

Cross-examination.

By Mr. Clark:

The witness on cross-examination, testified as follows:

My intention in going up there, was to see if we couldn't get the men to move the sheep off the cow range. There was nothing said at any time while I was there, in regard to Peter Iphar, John Mallea or Bert Etchart, going anywhere they wanted to go personally. Our only object was to get the sheep off of that part of the country. They were on what is called Boone Creek. I don't know that it is anybody's land in particular. I have a claim of land in there.

Redirect examination.

By Mr. Smead:

Q. Mr. Larter, your request to those men at that time, was that they take their sheep and move them across the river, and
47 take them along the trail on the other side, was that it?
A. Yes, sir.

Q. Were you ever requested by Mr. Bates or Mr. Donahue to go back to that camp at any time?
A. No, sir.
Q. They didn't say anything to you about it the next day?
A. No, sir.

Mr. Smead: That is all.
Mr. Clark: That is all.

JOHN MALLEA, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Smead:

My name is John Mallea, my nationality is Spanish. I have lived in this country eight years. I know Peter Iphar, I worked for some people by the name of Bidegain and Etchecahar. I worked above Mackay, in Custer County, in August, 1919. Bidegain and Etchearchar had three bands of sheep. I was running the same band that Pete Iphar was. I was running that outfit. I was running all three bands in charge of them as foreman. Bert Etchart was herding the band that Iphar was with. I know a man by the name of John Moscho. He was herding the other bunch, the first band. The band that Pete was camp tender for, was the second band. There was still a third band further up. I was
48 around those bands of sheep on the 25th day of August. I was at the place where Pete Iphar got hurt, the next day. The day before he got hurt, I come up town and met two men in the road. One was Bates, I don't know which one was the other fellow. On the 25th about a mile and a half from the sheep, they tell me where was I going, and I tell them, I am going to camp, and they tell me they had moved one band across the river, and they are going to do the same thing with the other band.

They say, they going to move everything across there. That was all the talk I had at that time. It was sometime on the morning of the 25th, about 10 or 11 o'clock of the 25th, and those two fellows come up with me, up to the camp. There was three or four more there, when we come. The camp was Pete Iphar's camp. I sat down there, and in a little while they said they were going to move the band on the other side, and I told them we wasn't going to move until the boss come in, and when I said this, they said line up boys, line up, Bates said. He was speaking to his partners.

Q. Do you know the men by name that were there besides Bates?
A. No, I can't tell the names of the others.
Q. You don't know their names?
A. No.
Q. Do you think you could recognize them?
49 A. There were too many around, I don't know which ones.
Q. What else did they say there, beside line up, etc.?
A. They come in there in front of us, and they went back, and Mr. Bates started to run me around a tree there.
Q. Running you around a tree?
A. Yes.
Q. What did you go around the tree for?
A. I don't know, I don't know what he wanted.
Q. Why did you go around the tree?
A. Because, I didn't want him to do something to me, I was scared of him. He stopped after a while, that is all he do. He said he was going to move us down, move the sheep and everything. Didn't have much talk at all.

I was at Pete's camp the next morning, the morning, of the 26th. After breakfast I went over to catch my horse, and see two or three fellows com- up the road, and after a little while, Pete Iphar come after his horses. He come up there to where I was, after our horses. I catched my horse, and I went down to camp. Pete come in behind me too.

Q. Did you see any of the men there at the camp after you got back with your horse?
A. I saw four or five horses going up to where the sheep were.
Q. Was that after you got back to the camp, that you
50 saw them going up to where the sheep were?
—. And that after a while they come there to camp and they said, you French son of a bitch put your hands up right now, Bert Etchart was there besides me, and Pete at that time. Do you know where Bert Etchart is now. Five other men that came up to the camp there, at that time. I know two fellows, that is, all I know, because after they come up, they come in a big bunch, I don't know which it was. The two men of the first bunch that came there, that I know, were Charley McKelvey and Emmett Donahue.

Q. You say that after the shooting some more come in, did you know any of those?
A. Bates, I know one, I don't know the other fellows.
Q. Do you know the other men by sight? When you see them do you know who they were?
A. I know lots of fellows who are there.
Q. I can't quite hear you. Answer again, please.
A. I know them if I see them, all right.

Juror: Judge, have him speak a little louder, please.
Mr. Smead: Speak a little louder.

A. Three or four there.
Q. You say you know them when you see them?

A. Yes, sir; some of them.
51 Q. Have you seen those men here?
A. Yes, sir.

After they told us to put up our hands thew shoot at the same time, they were shooting, when I put up my hands. They didn't sho-t me.

Pete Iphar, got shot there that morning. The men who had come there and done the shooting, say further to us, they said you black sun of a bitch, hands up, after Pete fell down, one fellow went with a pistol and said, I am going to finish you up. It was Emmett Donahue. After that they tried to catch the horses, they told Pete to catch the horses. The pack horses were there, and after that they made me pack the horses.

Q. What did they want you to do when you got the horses packed, did they say?

A. Move us down across the river.

Move the sheep and everything, they tell me to pack. I pack them, after I got the horses packed, I went down, and they was drivin' the sheep down across the river. Some of the fellows and Bert. Bert Etchart, he was with them, too. I do not know whether they said anything to Bert, after this shooting or told him what to do. I was coming back when I first saw Mr. Bates, and this other man. I had been at Mackay. I went to Mackay to tell the boss on the 24th they tell me to move the sheep, two days before the shooting. Charles McKelvey and Lehman, I know them two
52 fellows, came to see me on the 24th. I don't know the others, that was on the 24th, two days before the shooting. When McKelvey and Lehman came on the 24th, they said to me whose sheep were they, first, and how long we going to stay there. I tell them we are going down on the desert, and they said to me to move the sheep right away across the river to the other side. We were going straight the way, the boss tell us to go, on the right side of the river there, the side we were then on. The boss tell us to go that way, on the 24th I tell them that. When I come back on the 25th, it was the 25th, that I come back from Mackay, after seeing the boss. I intended to stay there with them until he come, he was to come the same day in the afternoon. I was there that evening when the boss came. There were five fellows there, I don't know which it was, when the boss came to the camp. I know that little fellow that has just been here, the witness just before me, that was one, and Bates I know them two, don't know the others.

Cross-examination.

By Mr. Clark:

Q. After you crossed over onto the sheep trail, you got on to the desert all right, didn't you, on the other side of te river, where the ranchers wanted you to go, you had a sheep trail right onto the desert, didn't you?

A. That way was a trail the same as on the other side.

53 Q. Now, at any time did any of these men tell you, that you couldn't go anywhere you wanted to go, or did they just tell you, they didn't want the sheep there?

A. No, sir.

Q. They just told you they didn't want the sheep there?

A. Nobody told me, that, they tell me the 24th that is all, nobody tell me before then.

Q. And all they they told you then, was that they wanted you to take the sheep off of there and go down the trail?

A. They said to me, you can't go through there at all, they were going to take ours away from me, they said.

Q. Did they say that about you or about the sheep?

A. Everything, they says, sheep and us.

I go the right side of the river, when I left to go down to phone to Mackay, nobody stopped me, and I came back when I got ready, and that was across this same land, that we were on with the sheep. I went across this same land when I went to Mackay, I rode across it, we never come across there with the sheep. I come through the highway, rode right down to the highway and went on to Mackay on both sides of the river, there is a road there, and you can go any way.

54 Q. The first you saw of these men, on the 26th day of August, was when they rode into camp, that was the first conversation?

A. I ain't got no conversation of the 26th at all.

The only thing I observed in regard to these fellows, was when they rode into camp, and told me to throw up my hands, and they shot at the same time, they told us to throw up our hands. I put my hands up, they said throw up your hands, and shot at the same time, they said throw up your hands. I was armed. I had a gun, a Luger, had it on at that time. I never touched it. When they said, throw up your hands, I was about ten or fifteen feet. There were four or five of them, I don't know, five I think it was. They come in a bunch, and I don't know which was, they all had guns. They all shot, shot right at us. They made two big noises, I don't know how many times they shot, I can't count them. I can't tell approximately how many times, I can't count them, they were going fast, and all the times they were shooting, I was standing there with my hands up. And they were shotting pretty close to me, one bullet I know. No one else got shot there, besides Pete Iphar.

Redirect examination.

By Mr. Smead:

The sheep were not in the same place, right after the shooting, where they were that morning. The cowman moved them before shooting, they drive them down below, they did that before
55 the shooting. Bert Etchart, the herder come into camp, before the shootting, I don't know how long. Bert Etchart came into camp a little while before the shooting.

Mr. Smead: That is all.

Mr. Smead: John Moscho, this witness, Your Honor, will have to have an interpreter. The Court thereupon administered the oath to the interpreter, John Linder, and through the interpreter, the witness was sworn and examined:

JOHN MOSCHO, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

My name is John Moscho, nationality, Frenchman, speak English some, understand English a little, not very much. Work for Bidegain and Etchearchar, in the vicinity of Mackay, Idaho, in August, 1919. Know Pete Iphar and John Mallea, and Bert Etchart, Ramon Gomezo. Don't know where Bert Etchart or Gomezo are now. Was not present at the time Pete Iphar got hurt. On the 25th of August was herding a band of sheep, at that time, under John Mallea as foreman. The sheep were herded across the river. The cowmen drove the band across the river. Do not know them by name, do not know any of them. Of these men sitting back there by the rail, knows three in this row here, the first three, the last three, and one here, the man with glasses sit-ing by himself there to your left hand side of the rail, know him. He was one of the men who came there at the time my band was driven across the river. I
56 recognize the three men. Those last three there, and that man with glasses there. The first three there, I can't understand just which one, the man at this end of the row, next to the wall, was not one of the men, the man next to him is one of them, the third man from the wall, he is one of them, the fourth man from the end he is one of them, and the fifth man, I don't know, and the sixth man there, beyond the gate who wears glasses, he was one of the men who helped drive the sheep across. John Mallea was with me there at the time, at the camp of our outfit at the time these sheep were driven across the river. That is John Mallea, the foreman, who was looking after the outfit, did not understand much of what was said at that time. After our sheep was driven across the river, I also crossed the river.

Mr. Smead: I want to recall Pete Iphar for a question I overlooked on direct examination.

The Court: Very well.

PETER IPHAR, a witness heretofore duly sworn, on behalf of plaintiff, upon being recalled testified as follows:

Q. Peter, when you were on the stand before you were asked about the circumstance of your getting shot, and where the bullet hit, you have anything further to say as to how you came to get hit in that particular place?

A. Yes, sir.

57 Q. Can you explain that?

A. After the first shot, when the first shot was fired, those bullets went pretty close to me, and I just turned a little bit around, see.

Q. Stand out here and show the jury, did you have your hands up at the time?
A. Yes, sir
Q. Show us what you did after the first shot was fired.
A. (Illustrating:) Just turned a little bit like that.
Q. You mean you dodged?
A. Yes, kind of *l*odged it, see.

Mr. Smead: That is all.

BEN R. GRAY, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination:

My name is Ben R. Gray, live at Hailey, Idaho, position of Registrar of the United States Land Office.
Q. I will ask you to examine these two plats, that are pinned together here, Mr. Gray, and tell what those are.
A. That is the plat of Township Seven and Eight North, Range Twenty-two East, Boise Meridian.
Q. That is the Hailey Land Office District, is it?
A. Yes.
58 Q. Are those the official plats as prepared and kept, in the land office at Hailey, of that territory?
A. They are.
Q. Do those plats show the entries upon the public domain in those two townships?
A. They do.
Q. Now holding this so the jury can see it, in Township——

Mr. Clark: I think it should be offered in evidence, Your Honor.
Mr. Smead: Well, I offer it, Your Honor, as the official plat of those townships.
Mr. Stevens: We shall object to this, if Your Honor please, upon the grounds, that it is incompetent, irrelevant and immaterial, and for the further reason that the plat itself shows, that it is not as a whole public land, taken as a whole, that township eight shows there are practically no public lands of any kind in it, but that it is all appropriated land, and that a portion of the other is not public lands, and I think the further objection that there is up to this time no testimony before the Court showing that these sheep were at or near or even in the vicinity of Township Seven or Eight.
The Court: The objection is overruled.
Mr. Stevens: An exception.

(Here follow certified copies of maps of townships seven and eight, marked pages 58*a* and 58*b*.

Q. Mr. Gray, calling your attention to the plat of Township Eight, which you have already identified and to another plat,
59 marked Township Eight North, Range 22 East, what relation does the second plat that I have handed you bear the one that you have already identified?

A. It is a part of Township Eight, but the survey was made at a later date. The survey of the first one was made at one time, and the balance here in the west part of Township Eight was made at a later date.

Q. The second plat, I have handed you, is supplemental to the first, is it?

A. No, it isn't supplemental because it doesn't cover the same land, it covers another part of the township.

Q. The second plat is calculated to show the land that wasn't surveyed at the time the first plat was made?

A. Yes, that relates, however, only to Township Eight North, Township Eight, yes.

Mr. Smead: We offer this second supplemental plat as evidence.
Mr. Stevens: The same objection.
Mr. Clark: Just one question, before it is offered.

Q. Mr. Gray, does this map show the condition of that land as to your record of the 26th day of August, 1920, or the present condition of that?

A. The condition at that time and also at the present.

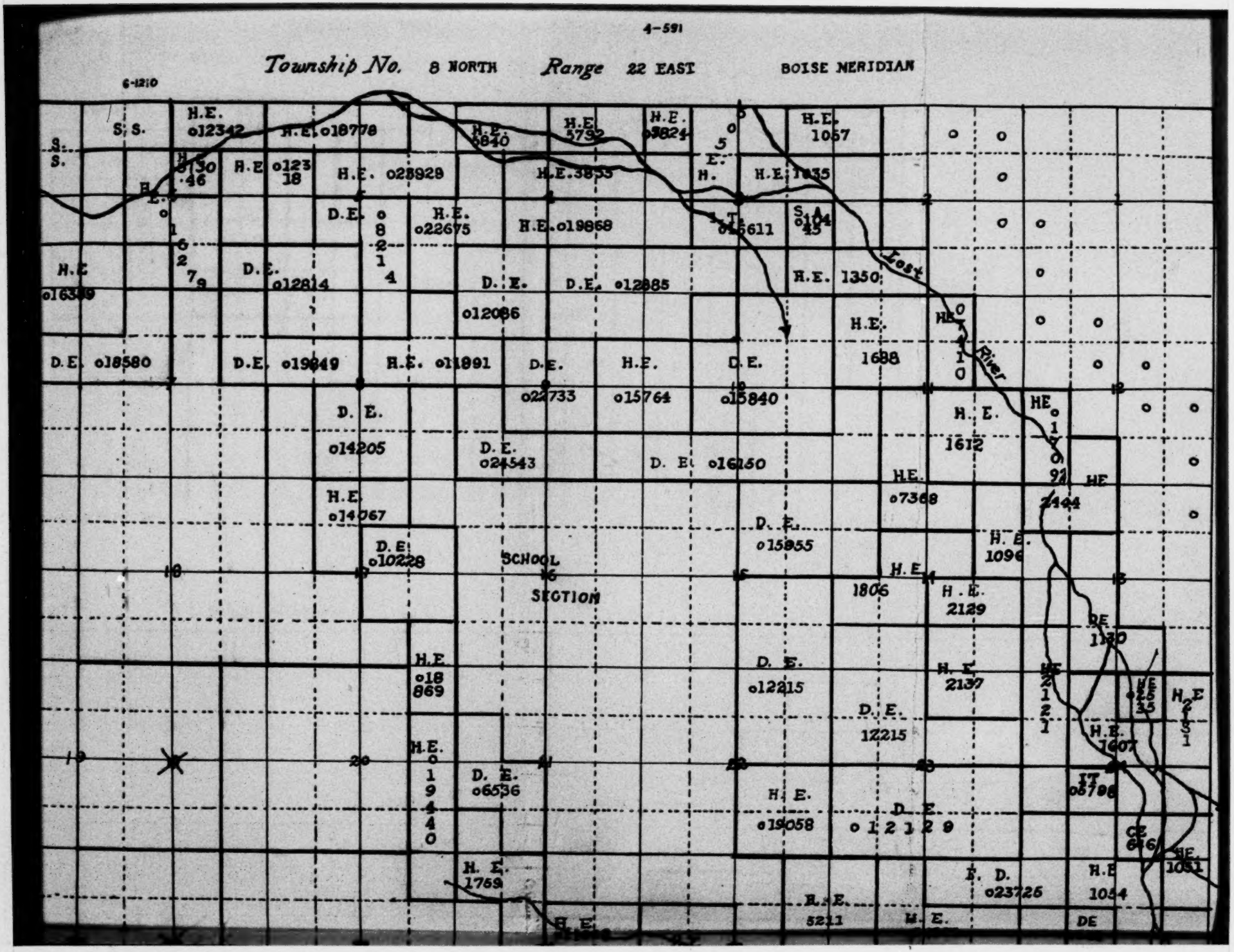
Mr. Smead: We offer this in evidence.
The Court: The objection is overruled.

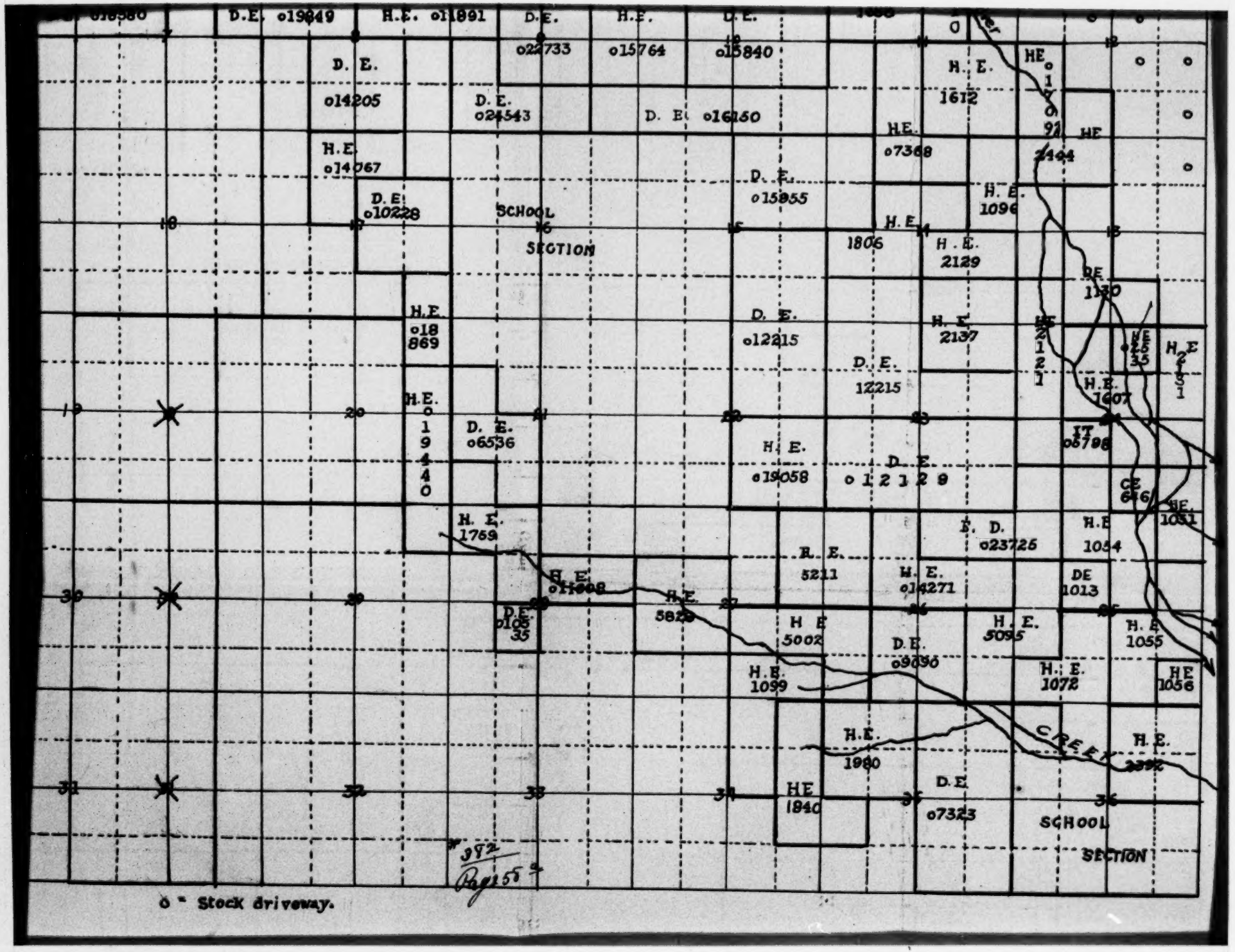
60 (Here follows certified copy of supplemental map of township eight, marked page 60*a*.)

4-591

6-1210

Township No. 8 NORTH Range 22 EAST BOISE MERIDIAN

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D.E. o15840
D. E. o14205
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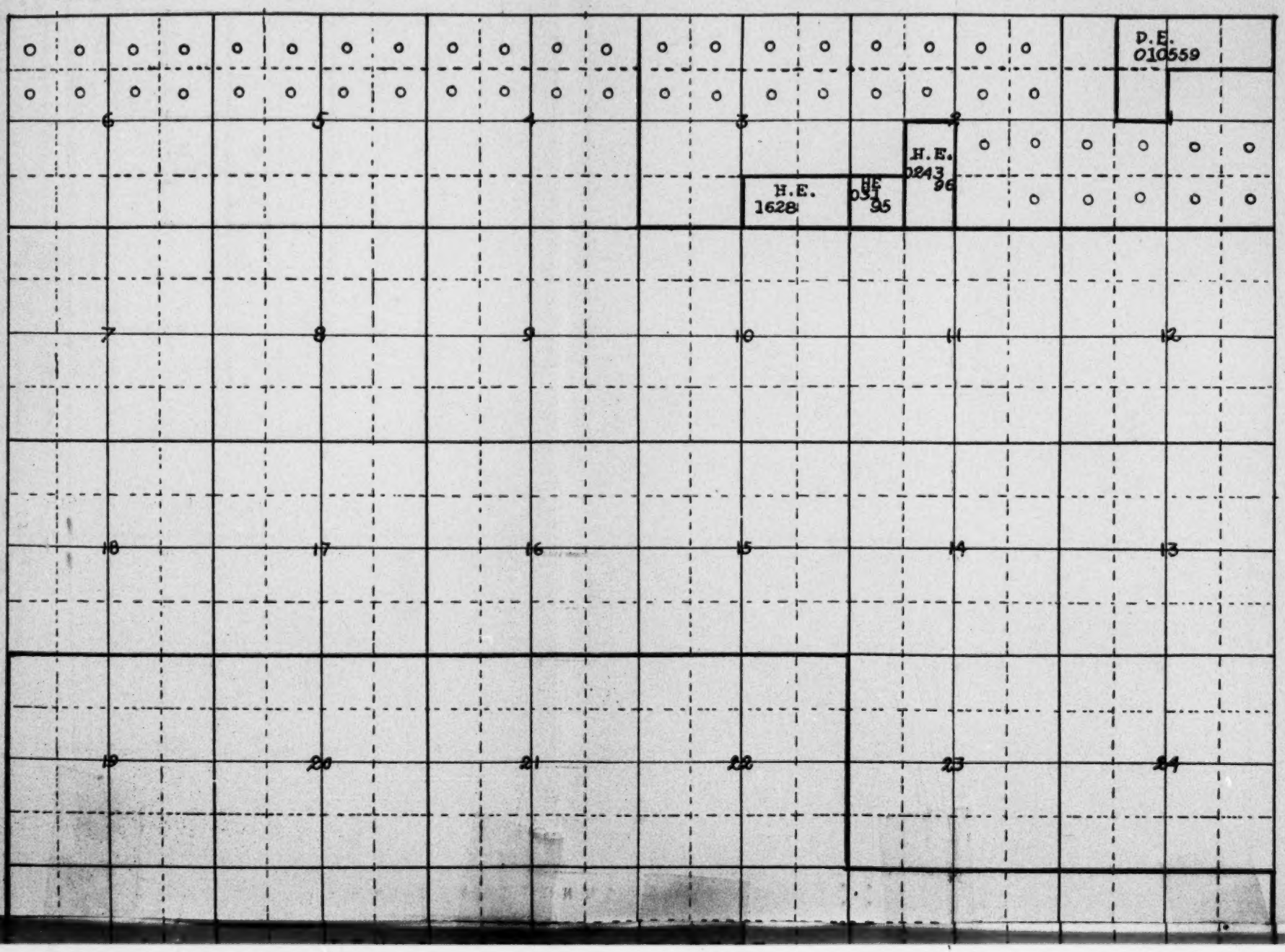
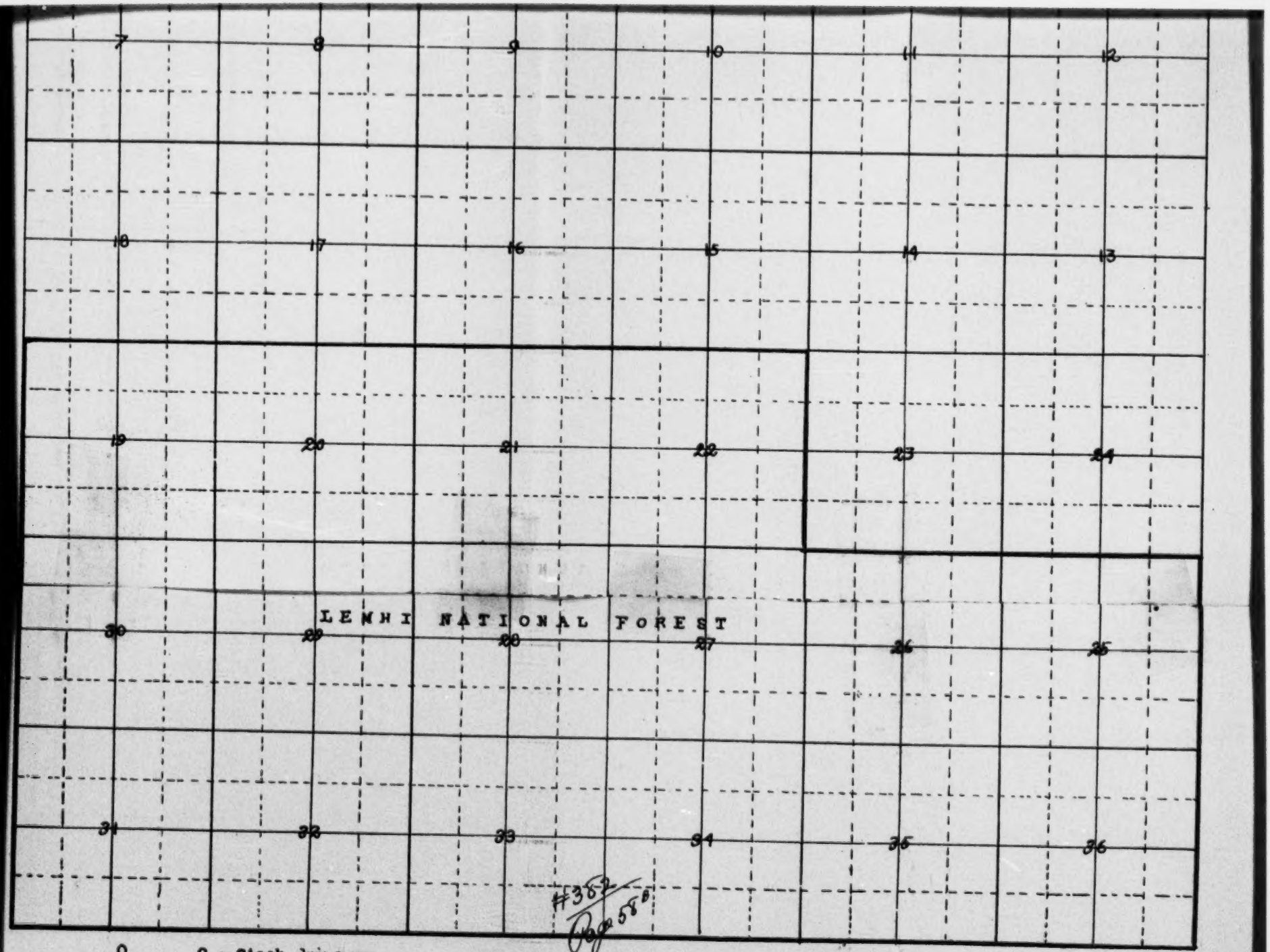
D. E. o16150
H.E. o14067
D.E. o10228
SCHOOL SECTION
H.E. o18869
D. E. o12215
H.E. o19440
D. E. o6536
H. E. o19058
D. E. o12129
H. E. 1769
H. E. o11008
H. E. 5829
D.E. o10535
H E 5002
D.E. o9050
H.E. 1099
H. E. 1612
H.E. o7368
D. E. o15955
H. E. 1096
H. E. 1806
H. E. 2129
D. E. o12215
H. E. 2137
H.E. 1607
H. E. o6798
E. D. o23725
H.E. 1054
R. E. 5211
H. E. o14271
DE 1013
H. E. 5095
H. E. 1055
H. E. 1072
H. E. 1056
H.E. 1980
H. E. 2392
HE 1940
D.E. o7323
SCHOOL SECTION
CREEK
o = Stock driveway.

4-591.

Township No. 7 NORTH *Range* 22 EAST BOISE MERIDIAN.

6-1310



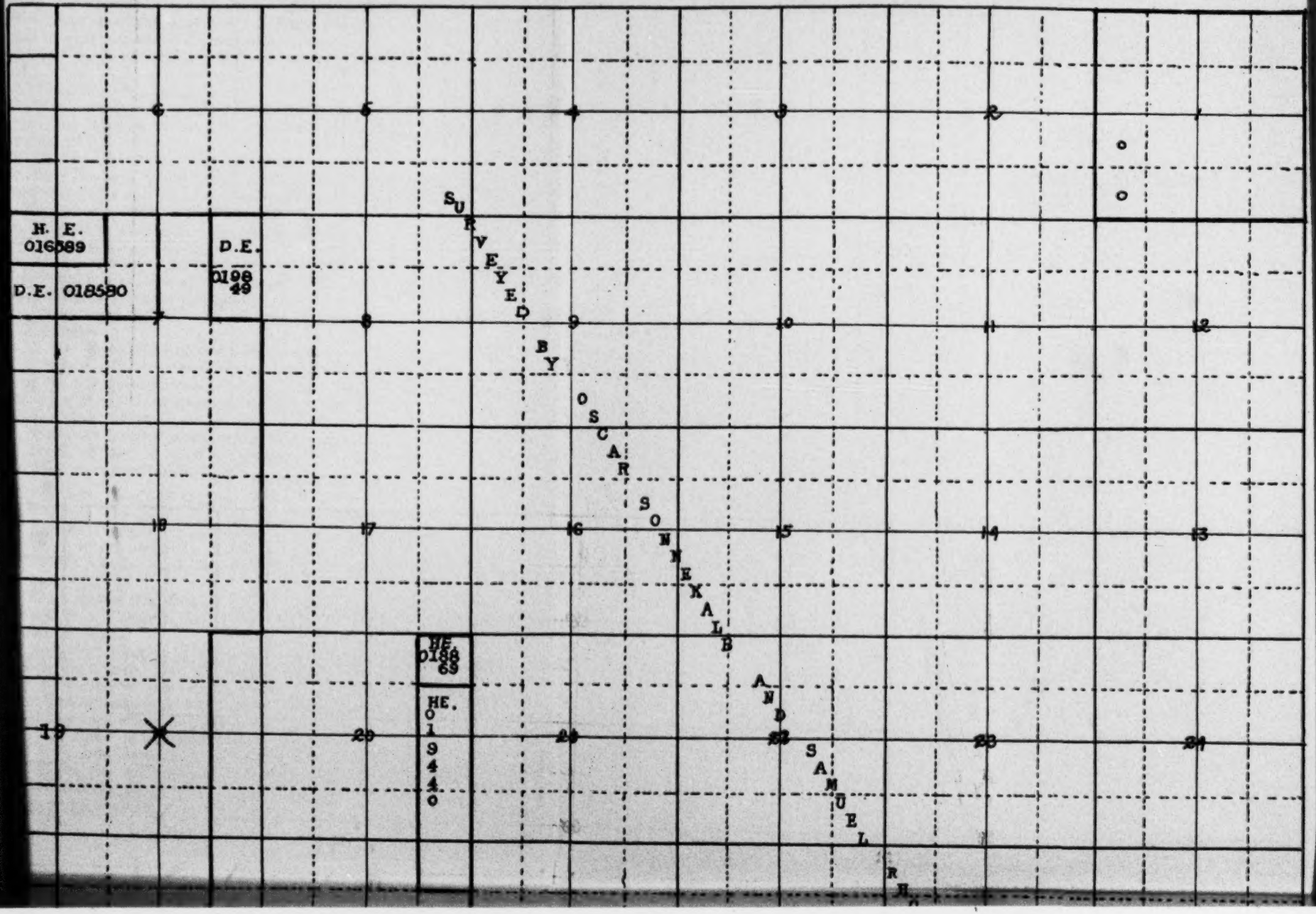


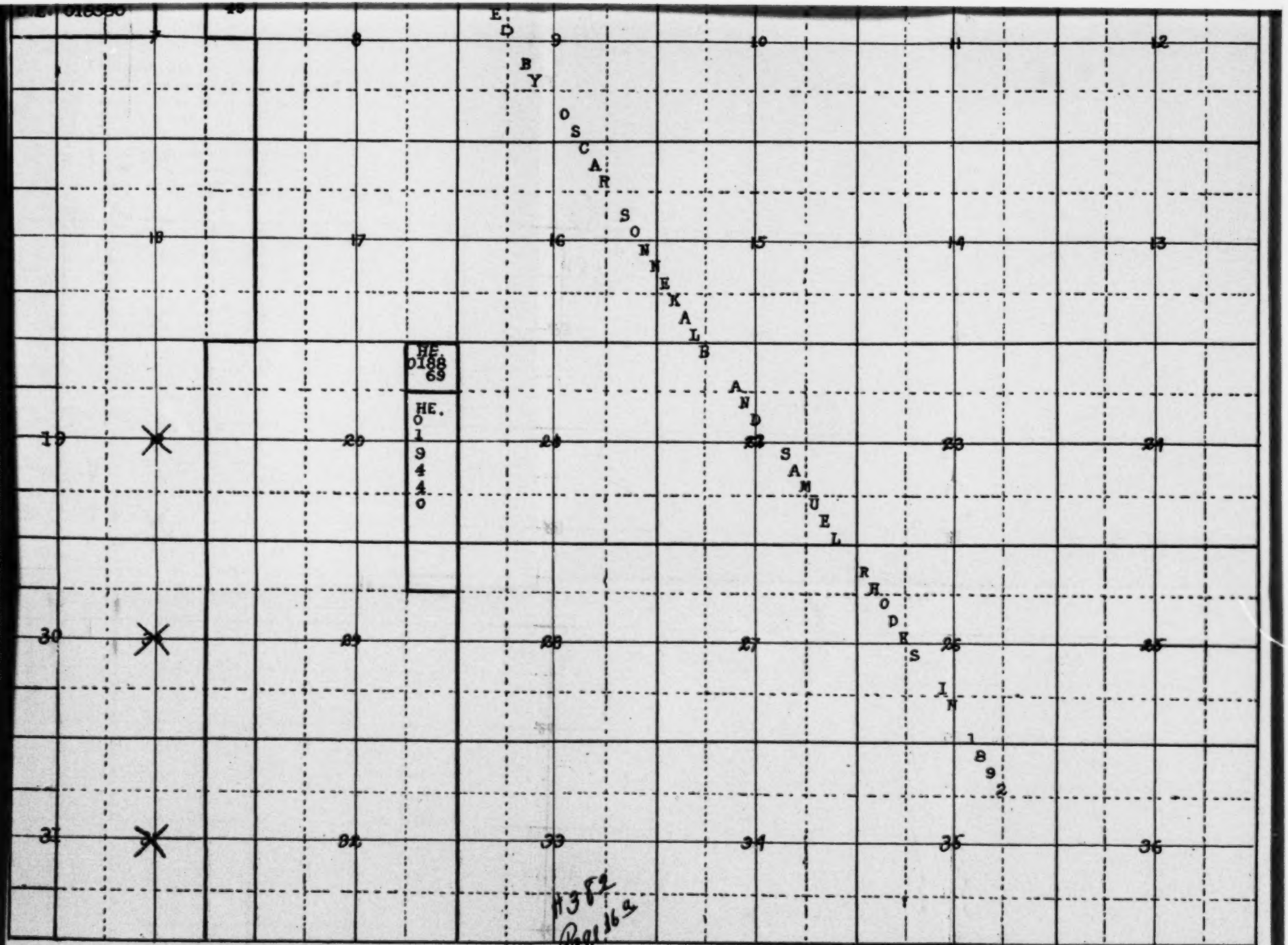
0 0 – Stock driveway.

4-591

G-1210

Township No. 8 NORTH Range 22 East BOISE MERIDIAN





#382
Page 16a

o = Stock driveway.

Mr. Smead:

Q. Now, in the plat of Number Eight, the original plat, which I handed you, Mr. Gray, these pieces of land outlined in black ink here, these different parts of the township are indicative of what?

A. Of entries of different people. Each one that is inclosed in a square is a certain entry of some one.

Q. And the land which is not so enclosed, in what condition is that?

A. That is vacant public land.

Q. What about the plat of township Number Seven? There is a green line running across it and around a part of it. What does that indicate?

A. That is enclosed in a forest reserve.

Q. And the land lying to the north of that on the plat, that is, toward the top of the plat, in what condition is that, as to whether it is entered or vacant public domain?

A. Most of it is vacant. Anything that doesn't show an entry enclosed, is vacant public land.

Q. At the northeast corner of the plat there is a strip of land which is white, and some of it is marked off in pencil in squares and shaded. What do those indicate?

A. Those are entries, the shaded portions in these three sections.

61 Q. Now, referring for a just a minute to the supplemental plat of eight, or the additional plat which I handed you, I find in the extreme western side of that where the new surveys shows on it as you stated a few pieces of territory marked off in black ink, what does that indicate?

A. Those are entries taken by different people.

Q. South of that, in what condition is that territory?

A. That is vacant public land.

Mr. Stevens: South of What?

Mr. Smead: The furtherst south of those entries shown in black ink. I refer to territory lying south of those furthest south.

Q. Down in the southwest corner in a square marked off in lead pencil with a number on it, and pencil mark run through it. What does that mean?

A. That means that that is vacant at the present time. That there was an application, and it was either withdrawn or rejected, and that is vacant.

Q. Now, Mr. Gray, I have tried to put this supplemental plat alongside the original plat of Number Eight. This shaded portion of the supplemental plat which shows a new survey is the same portion that appears here without any shading on it, at all, on the original plat and which is marked mountainous, unsurveyed?

A. It is. That is the same piece of the land.

62 Q. And down here in Section Thirty-three, in Township Eight, you will notice on the original plat, and then the same on the supplemental plat here—has that been surveyed, according to your plats?

A. Yes, thirty-three here is on this original plat.
Q. Thirty-three is surveyed, but no entered land on it?
A. No entered land on it.
Q. Has there ever been any?
A. I couldn't say as to that without looking on the plat book. It isn't at the present time. There might have been applications made that were never allowed.
Q. If any application were allowed in Section Thirty-three, it would be marked out like these others?
A. Yes, sir.
Q. If any kind of application ever were made down there, it never was allowed, is that correct?
A. No, there has never been any allowed entry on that section.
Q. What about the territory immediately south of Section Thirty-three in Township Seven, has there ever been any entry allowed there. I mean all of Section Seven, except the forest reserve, and this strip in white at the extreme northeastern corner of it.
A. No*t*, there hasn't any entries ever been allowed on that.
63 Q. That only entries allowed in Section Seven then are these forties shaded with a lead pencil?
A. That is all.
Q. Now I hand you a book, Mr. Gray, marked "Tract Book." Do you know what that book is?
A. Yes.
Q. Is that one of the official records of your office?
A. It is.
Q. What is that book maintained for, what is the purpose of it?
A. Keeping a record of all applications for entry of all descriptions, homestead, desert and other entries.
Q. By reference to these plats which I have shown you and the data appearing thereon, and then by cross-reference to that tract book which you have on your lap, can you identify such parts of the land as has been entered or on which entry has been allowed.
A. Yes, sir.
Q. And the book then would also contain a record of any applications of any sort, that might have been made and not allowed?
A. Yes.
Q. Now, I will ask you to refer to that tract book——
A. Just a minute, Mr. Smead. Applications that have been made and not allowed and been rejected would not appear on here.
64 When they are rejected they are erased from this book.
Q. This is on your tract book?
A. Yes; when they are allowed they are placed in ink.
Q. The applications that are never allowed never get on the plats at all?
A. They are on there in pencil, but are erased when it is closed out.
Q. That is, you make a tentative entry on your plat, and a tentative entry on your tract book, so that you can rub it out if it is not allowed?
A. Yes.

Mr. Smead: We offer this tract book in evidence, Your Honor.
Mr. Stevens: The same objection as to the other.
The Court: Overruled.

(Reference is hereby made to Tract Book.)

Mr. Smead:

Q. Mr. Gray, I wish you would refer in that Tract Book to homestead entry on the northwest quarter of Section Thirty-five, Township Eight, Range Twenty-two East, Boise Meridian.
A. Section Thirty-five—and what is the description?
Q. The northwest quarter of Thirty-five, in Eight North, Twenty-two East?
A. That is a homestead entry of Henry Larter, applied for August 7, 1900, and the patent was delivered June 9, 1908.
65 Mr. Smead: I think that is all I care to ask just now.

Cross-examination.

By Mr. Stevens:

Q. Mr. Gray, referring to these plats which have been handed you, is any part of land in Sections Seven or Eight North, Range Twenty-two East, in the forest reserve?
A. Just let me see it.
Q. Is any part of the land in those two townships which you have been testifying about in the forest reserve?
A. Just let me see it.
Q. Is any part of the land in those two townships which you have been testifying about in the forest reserve?
A. Yes, part of it, in Section Seven.
Q. What part of Section Seven is in the forest reserve?
A. This right here. It is all of the south half except these two sections here, sections 24 and 24; all the balance of the south half of that township is in the forest.
Q. The part that is surrounded by the mark in ink?
A. Yes.
Q. Is in the forest reserve, being approximately half of the township?
A. Yes.

66 HENRY LARTER, heretofore duly sworn, on behalf of the plaintiff, upon being recalled, testified as follows:

Direct examination.

By Mr. Smead:

Q. Mr. Larter, handing you some plats herein, which have been identified by the last gentleman on the stand, I call your attention to a piece of land shown on the plat of township 8 north, the northwest quarter of section Thirty-five, in Township Eight, which has

been just identified as your place. Taking that as your place can you tell me and show on this plat where is located a certain big spring that has been referred to here frequently in the evidence yesterday. The top of the plat is north, towards your left is west, and the bottom south, and towards your right is east.

A. Let me have your pencil. That spring would lie right above here.

Mr. Smead: I will mark the place. (Marking) Right there?

A. Yes.

Q. I have put a cross in lead pencil. That spring is commonly known there as The Big Spring?

A. Well, it is known as Boone Spring.

Q. Boone Spring?

A. Yes.

67 Q. Can you tell me where it was that you and Mr. Bates and one or two others, I think you said visited this sheep camp where Peter Iphar was, the night before you heard of the trouble, the afternoon or evening of August 25th, where from that big spring was it?

Q. Peter, recalling to your mind the incidents of a visit to your

A. It was about two miles west of there.

Q. That would be over towards your left on the plat?

A. Yes, sir; probably a quarter of a mile south.

Q. Taking these sections as shown here then as a mile across each, you have located the spring in Section Thirty-four, where I put my pencil. It would be across that section and across Section Thirty-three, about two miles west?

A. Two miles, I would judge, west.

Q. And perhaps a quarter of a mile south?

A. Yes, sir.

Q. That would place it probably in Section Thirty-two or Thirty-three, as shown here, or in Section Four or Five in the Township to the south, is that correct?

A. That is, to the best of my knowledge.

Q. You think your distance there of about two miles west is pretty accurate?

A. Yes; I don't think it would miss it a quarter of a mile either way.

Q. You are pretty well acquainted with that country, are you, Mr. Larter?

A. Yes, sir.

Q. How long have you been up there?

A. I have been up there since '97 all the time.

68 Q. I want to call your attention to something else here on the plat. I show you another plat, which I will explain to you is supplemental to the plat of Section Eight, and shows the survey in this part which appears as mountainous and unsurveyed in white on the original plat of Eight. This piece here.

A. I see.

Q. I call your attention to the creek running along through the northwest corner of Section Seven, and continuing up into Section Eight.

The Court: Township Eight, you mean.

Mr. Smead: I mean Township Seven and Township Eight. That creek runs somewhere in the vicinity of where you have located this camp you have visited, Mr. Larter. Do you know what creek that is?

A. That is known as Boone Creek.

Q. Where was Boone Creek, or rather, where was this camp you visited, with reference to Boone Creek?

A. It was a little branch of Boone Creek, probably 150 yards from the main small creek.

Mr. Smead: I believe that is all I care to ask.

Recross-examination.

By Mr. Clark:

Q. Any conversation with John Mallea, at the Spring on the 25th of August?

Mr. Smead: Objected to as incompetent, irrelevant and im-
69 material, and not proper cross-examination.

The Court: Overruled.

A. Why he said, you fellows had not better go monkeying around with that sheep herder, that he had a gun man up there.

Q. Was there anything else said?

A. Yes, sir; Emmett Donahue asked him who the gun man was, and he said, the man with the military hat on.

Q. Did you at that time tell Mr. John Mallea, that you would have him arrested, if they kept the sheep there?

A. Yes, sir; I told him that we would have to file a complaint against him.

Mr. Clark: That is all.

Redirect examination.

By Mr. Smead:

Q. Were you having a quarrel with Mr. John Mallea, at this time you were testifying about?

A. No, sir; no quarrel.

Q. Were you angry?

A. No, was just talking as men will talk.

Q. Were you angry?

A. No, sir; I wasn't angry.

Q. Did anybody else seem to be?

A. No, sir; nobody.

Q. Did John seem to be angry?

70 A. Yes, he seemed to be a little bit angry to think that we was bothering around there.

Q. Didn't like it when you told him you were going to arrest him?

A. He didn't seem to care anything about that.

Q. Did you tell him at that time what you were going to do, Mr. Larter, about these sheep?

A. Nothing more than what I have stated.

Q. Was he referring to something that had been said by some of your party, when he said you hadn't better monkey around up there?

A. No. We told him we was going up there.

Q. You told him you were going up there?

A. Yes, and he said we had better not.

Q. Did you tell him what purpose you were going up for?

A. No, we didn't tell him what purpose we was going up there for, any more than we was going up there.

Q. And that is all you said to him. You just said you were going up to the sheep camp?

A. That is everything I recollect saying.

Q. And he said you had better not, for he had a gun man there?

A. Yes, sir; and me and him rode together.

Q. And you don't know whether there was a gun man there?

A. No, sir; I don't.

Q. When you got up there did anybody try to use a gun on you?

71 A. No, sir; everything was peaceable.

Q. Was there any quarrel or threats of violence when you got up to the sheep camp that day at all by Peter Iphar or anybody else?

A. No, sir; not in my presence.

Q. Was Pete- Iphar armed when you got up there that day?

A. No, sir; he was not.

Q. You didn't see him packing any gun at all?

A. No, sir.

Q. Did he get mad when you were there?

A. Not that I know of.

Q. He talked like a gentleman?

A. Yes, sir.

Mr. Smead: That is all.

Recross-examination.

By Mr. Clark:

Q. Everybody talked like a gentleman that day, didn't they, Mr. Larter?

A. Yes, sir; everything was peaceable.

Q. All the ranchers that were there talked like gentlemen?

A. Yes, sir.

Q. And were peaceable, too?

A. Yes, sir.

Mr. Clark: That is all.
Mr. Smead: That is all. Peter Iphar.

PETER IPHAR, heretofore duly sworn on behalf of plaintiff, upon being recalled, testified as follows:

72 Direct examination.

By Mr. Smead:

Q. Peter, recalling to your mind the incidents of a visit to your sheep camp in the afternoon or evening of the day before you were shot, by a party of men, of which Mr. Larter, who just left the stand, was one, where was the place where the shooting occurred the next day, where you were hurt, with reference to the place where you were when they called on you that afternoon or evening?

A. The same place.

Q. You were shot right at the same camp where they visited with you on the evening or afternoon of the 25th?

A. Yes, sir.

Q. Are you familiar with the territory that lies below and by that I mean on down in the general direction that the Big Lost River flows, are you familiar with that territory that lies below where you were when this shooting occurred? Have you been over it?

A. Yes, sir.

Q. Have you had stock in there?

A. Not then.

Q. But before, I mean.

A. Before; yes, sir.

Q. Now, I will hold this map here for you. Taking from a point somewhere about Section 33 or 32 here, and calling your
73 attention to a green line on this map which bounds the forest reserve on the north, that is, toward the top of the map, where does that country lie for which you were headed at the time, this shooting occurred? Placing yourself somewhere up here about Section 33 or Section 32, at the time you were hurt, where were you going?

A. Which way is towards Mackay?

Q. Take to bottom of the map as south, and the part of it to your right hand as east.

A. We were going this way (indicating).

Q. Show us on the map?

A. Where is that Boone Creek there?

Q. This is the beginning of Boone Creek, and continue it in your imagination across these unsurveyed tracts here. And I will tell you further, these pieces of land right here, marked off in black ink, you can take as the settled country, and here is Lost River, shown on the land running down toward Mackay. What territory were you starting to go over there with your sheep?

A. We were coming this way, through that country.

Q. South and east, down towards Mackay?

A. Yes, southeast towards Mackay.

Q. The country you were going to travel through then, is the country that borders on the forest reserve?

A. Yes, sir.

74 Q. Lies between the forest reserve and the settled country, those ranches?

A. Yes, sir.

Q. Did you tell at any time when any of these men came to your camp before you were hurt, that morning, did you tell them where you were going with these sheep?

A. Yes, sir.

Q. What did you tell them?

A. Told them, I was going to take the old trail, which was the land between the ranches and forest reserve.

BEN R. GRAY, heretofore duly sworn, on behalf of the plaintiff, upon being recalled testified as follows:

Cross-examination:

Q. The red circles on the plat is withdrawal for stock driveway. The government provides a driveway through that section any place where you see those red marks, where those red circles are. It is withdrawn by the government for sheep and other stock to cross the territory.

Q. That is a stock driveway across the Northeast corner?

A. Of Township Eight North, yes.

Q. There appears from the records before you no other stock driveway through any part of this?

A. No, there is nothing.

Redirect examination.

By Mr. Smead:

75 Q. That stock driveway you have identified for counsel lies over to the east and north of Big Lost River, does it not?

A. I didn't notice, it is shown on the plat there.

Mr. Smead:

Q. Calling your attention to these irregular black marks running down there, what does that indicate?

A. That is Lost River.

Q. And on the map that stock driveway you have shown is to the east and north of the river?

A. Yes, sir.

Q. Do you see any stock driveway to the west or south of the river there?

A. No, there isn't.

Mr. Smead: That is all.

Mr. Smead: With the consent of counsel for the defense, Your Honor, I am allowed to say that we agreed that a subpœna has been

issued in the case for Bert Etchart, and that he cannot be found, according to the return made by the officers. With that we rest.

At the close of the foregoing evidence, in chief, offered by the plaintiff, counsel for the defendants demurred to the plaintiff's evidence as follows:

Mr. Clark: Now come the defendants and demur to the Government's evidence in the above entitled cause upon the grounds and for the reasons that:

76 1. That said evidence does not prove or tend to prove the defendants or either of them guilty of any crime against the laws of the United States of America.

2. That the said evidence is not direct and certain.

3. That this Court is without jurisdiction of the offense sought to be proven.

4. That there is a variance between the indictment in this case and the evidence here, in this:

(*a*) The indictment charges the prevention and obstruction of certain persons from free passage and transit over the public land, and the evidence shows that the obstruction, if any there was, was directed against certain sheep, and not against the persons named in said indictment.

(*b*) The indictment charges the prevention and obstruction from free passage and transit over certain public lands, to-wit, townships seven and eight are not public land as a whole, but only certain portions thereof are public lands.

And we therefore move upon this ground for a nonsuit of the Government in this case.

Which said demurrer the Court then and there overruled, which ruling was excepted to by defendants, and the Court said, "You may have your exception."

Witness- for the defendants, Chas. Baker, E. J. Bates, Dan Clark, Will Criswell, C. C. Davidson, Emmett Donahue, Thos. Donahue, Dr. N. H. Farrell, Aubrey Fullmer, Eddie Hammerly, John
77 Howell, Chas. Howell, Rudolph Lehman, Carl Lehman, W. I. Nielson, Bob Parsons, Lee Pence, George Rosencrans, A. B. Reed, A. D. Streeter, Milford Vaught, Scott Vaught, Clay Vance and Chas. Warren, were whereupon sworn for defendants, and examined by both counsel.

Whereupon defendants rested, and H. B. Thompson, Jesse Motts, were called as witnesses in rebuttal on behalf of the plaintiff and were examined by both counsel, whereupon the plaintiff rested, and Milford Vaught, Jesse Motts, George Rosencrans, Scott Vaught, and Rudolph Lehman, were called as witnesses in sur-rebuttal, on behalf of defendants, and examined by both counsel, whereupon the

defendants rested, and the plaintiff announces to the Court they had nothing more.

Whereupon the plaintiff moved to dismiss the case as against Thomas Donahue, which motion was by the Court allowed.

Whereupon the defendants renewed their motion in following form:

Mr. Clark: Come now the defendants and move the Court to instruct the jury to bring in a verdict of not guilty, upon the following grounds:

1. That said indictment and matters and facts therein contained in manner and form as the same is stated do not constitute a crime against the laws of the United States.

78 2. That said indictment and the matters and facts therein contained, in the manner and form as the same are stated, are not direct and certain. That the above entitled Court is without jurisdiction of the offense set out in the indictment on file herein.

That there is a variance between the proof introduced and the indictment as to the public domain, in that the evidence offered by the government shows that township seven and eight north, range twenty-two east, Boise Meridian, are not as a whole public domain.

That the evidence is insufficient to support the indictment.

That the evidence adduced here on behalf of the Government wholly fails to sustain the charge made in the indictment.

That there is no evidence in the record to sustain the charge that the parties named in the indictment were prevented from having or enjoying free passage over the public domain described in the information.

Do you care to hear any argument?

After the Court instructed the jury, the jury thereupon retired to consider their verdict and returned into Court finding the defendants, Charles McKelvey, Emmett Donahue, Charles Warren, E. J. Bates and Rudolph Lemhan, guilty as charged in the indictment.

79 On the 19th day of October, 1920, the defendants were brought before the Court for the announcement of judgment on the grounds, as set forth in said motion, which motion is on file herein, as from said motion will more fully appear, which said motion was by the Court then and there overruled, and judgment was thereupon pronounced as from said judgment will more fully appear.

And now, in furtherance of justice, and that right may be done, the defendants, Charles McKelvey, Emmett Donahue, Charles Warren, E. J. Bates and Rudolph Lehman, through their counsel, tenders and presents the foregoing as their Bill of Exceptions in this case, to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court.

The foregoing is duly allowed and settled as the defendants' Bill of Exceptions and contains in substance all evidence adduced by

the Government in its case in chief, but none of the evidence adduced by defendants, or by the Government in rebuttal.

Dated Dec. 10, 1920.

FRANK S. DIETRICH,
Judge.

Filed Dec. 10, 1920.
W. D. McREYNOLDS,
Clerk.

80 (Title of Court and Cause.)

Petition for Writ of Error.

Criminal.

Comes now the defendants herein and complain and say:

That on or about the 19th day of October, 1920, this Court entered judgment and sentences herein in favor of the plaintiff and against the defendants in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the defendants all of which and more in detail appear from the Assignments of Error which are filed with the petition.

Wherefore, these defendants pray that a Writ of Error may issue in their favor out of this Court or out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit.

J. M. STEVENS,
Attorney for Defendants.

Residence and Post Office Address, Pocatello, Idaho.

CHASE A. CLARK,
SOLON B. CLARK,
Attorneys for Defendants.

Residence and Post Office Address, Mackay, Idaho.

81 Endorsed: Filed Oct. 19th, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Assignment of Error.

Criminal.

Come now the defendants in the above entitled action, in connection with their petition for Writ of Error and make the following assignments of error, which they aver, occurred upon the trial of the above entitled cause, to-wit:

1. That the Court erred in overruling the motion of defendant to dismiss said indictment in that said indictment and matters and facts therein contained in manner and form as same are stated, did not constitute a crime against the laws of the United States of America and that said indictment and matters and facts therein contained in manner and form as the same are stated, are not direct and certain.

That the above entitled Court is without jurisdiction of the offense set out in the indictment on file herein.

2. That the Court erred in overruling the demurrer of the defendants to the indictment on file herein in that the said indictment and matters and facts therein contained in manner and form as the same are stated, do not constitute a crime against the laws of the United States of America, and that said indictment and mat-
82 ters and facts therein contained in manner and form as the same are stated, are not direct and certain.

That the above entitled Court is without jurisdiction of the offense set out in the indictment on file herein.

3. That the Court erred in overruling defendants' demurrer to the evidence of the Government, and refusing to grant a non-suit on said demurrer in that said evidence failed to show or prove or tend to prove the defendants, or either of them, guilty of any crime against the laws of the United States of America.

That the evidence showed that the Court was without jurisdiction of the offense sought to be proved.

That there was a variance between the indictment and the evidence in that the indictment charged the prevention and obstruction of certain persons from free passage and transit over public lands, and the evidence shows that the obstruction, if any there was, was directed against certain sheep and not against the persons named in said indictment.

That the indictment charged the prevention and obstruction from free passage and transit over certain public lands, to-wit:

Township 7 and 8, North Range 22, East B. M., and the evidence on the part of the Government shows that said Townships 7 and 8 are not public lands, as a whole, but only certain portions
83 thereof, are public lands.

4. The Court erred in overruling the defendants' demurrer to the evidence and motion to dismiss at the end of the testimony, in that taking the evidence as a whole, the evidence did not show the defendants had committed the offense alleged in the indictment or any offense against the laws of the United States of America.

That the evidence shows that the Court was without jurisdiction of the offense set out and attempted to be proved.

5. The Court erred in admitting the Government's Exhibit "A" which is a township plat of Township 7 and 8, North Range 22 East B. M. over the objection of the defendants in that said exhibit shows conclusively that townships 7 and 8 North, Range 22 East, B. M., are not public lands as a whole, as set out in the indictment.

6. That the Court erred in overruling defendants' motion in arrest of judgment.

That the indictment on file herein and matters and facts therein contained in manner and form as the same are stated, do not constitute a crime against the laws of the United States of America.

That the said indictment and the matters and facts therein contained in manner and form as the same are stated, are not direct and certain.

That the above entitled Court is within jurisdiction of the
84 offense set out in the indictment on file herein.

That that portion of Section 4998, U. S. Statute under which the defendants herein were indicted, to-wit: "or shall prevent or obstruct free passage or transit over or thru the public lands" is unconstitutional and void.

That said Section 4998, U. S. Statute under which this indictment is brought does not provide or make it unlawful for the obstruction of persons by force, threats, or intimidation as alleged in the indictment from free passage or transit over or thru the public lands.

That there is a variance between the indictment in this action and the evidence introduced herein in this:

(*a*) The indictment charges the prevention and obstruction of certain persons from free passage and transit over the public lands, and the evidence shows that the obstruction, if any there was, was directed against certain sheep and not against the persons alleged to have been obstructed in said indictment.

(*b*) The indictment charges the prevention and obstruction of free passage and transit over certain public lands, to-wit:

Townships 7 and 8, North Range 22 East B. M. and the evidence shows that said townships 7 and 8 North Range 22
85 East B. M. are not public lands as a whole, but only certain portions thereof are public lands.

(*c*) That the evidence introduced on behalf of the Government does not show or tend to show the commission of any crime against the laws of the United States of America on the part of the defendants or any or either of them.

(*d*) That the evidence introduced as a whole does not show the commission of any crime against the laws of the United States of America on the part of the defendants or any or either of them.

(*e*) That the evidence introduced herein on behalf of the Government does not show or tend to show, the commission of any crime within the jurisdiction of this Court.

(*f*) That the evidence as a whole shows by great preponderance of the evidence, that the lands in question were a cattle range as provided and defined by Section 8333, Idaho Compiled Statutes, and that persons named in the said indictment against whom the said de-

fendants are alleged to have acted, were upon said lands in violation of said Section 8333, Idaho Compiled Statutes.

(*g*) That the verdict is contrary to the law as given to the jury by the Court in this:

That the Court instructed the jury, if the range in question was a cattle range and the persons alleged to have been prevented from free passage and transit over the same were herding, grazing and pasturing their sheep on said range, then the jury should
86 find the defendants not guilty, when the evidence taken as a whole proved by a great preponderance of the evidence that said range was a cattle range.

(*h*) That the Court erred in admitting Government's Exhibit "A" which is a township plat of townships 7 and 8 North, Range 22 East B. M. over the objection of the defendants in that said plat showed that townships 7 and 8 North, Range 22 East B. M. were not as a whole public lands.

(*i*) That the verdict rendered herein is contrary to the evidence.

7. The Court erred in rendering and entering judgment against the said defendants upon the indictment for the reason that no penalty or punishment is provided for the commission of the acts charged in the indictment and there is no penalty or punishment provided by the laws of the United States of America for the commission of the acts as shown by the evidence to have been committed.

8. That the Court erred in refusing to admit certified copies of possessory claims made by these defendants and offered in evidence by the defendants.

9. That the verdict of the jury is contrary to the evidence in that the evidence conclusively shows that there was no intention to obstruct, or no obstruction of the individuals alleged in the indictment, but such intent, if any, was directed solely to the sheep
87 in question, and the evidence further shows the range in question was a cattle range.

10. That the verdict of the jury was contrary to instructions of the Court in that the Court instructed the jury that if the evidence showed that the range in question was a cattle range and that the sheep in the charge of the persons alleged to have been obstructed in free passage and transit over said range, were herding, and grazing upon said range, that they should find the defendants not guilty.

Wherefore, defendants pray that the judgment of the District Court may be reversed.

J. M. STEVENS,
Attorney for Defendants.

Residence and Post Office Address, Pocatello, Idaho.

CHASE A. CLARK,
SOLON B. CLARK,
Attorneys for Defendants.

Residence and Post Office Address, Mackay, Idaho.

Endorsed: Filed Oct. 19, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Bail in Error.

Criminal.

We, Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue, residing at Mackay, Custer County, Idaho, as principals and Charles F. Baker, A. B. Reed, Scott
88 Vaught, Clay Vance and C. C. Davison, residing at Mackay, Custer County, Idaho, as sureties, hereby acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of Ten Thousand ($10,000.00) Dollars, lawful money of the United States of America, to be levied upon our goods, chattels, lands and tenements, upon this condition, to-wit:

That if the said Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue, the defendants upon whose application a writ of error has been allowed by the District Court of the United States, District of Idaho and the Circuit Court of Appeals of the United States for the Ninth Circuit, shall be and appear before said United States District Court of Idaho, on the termination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate, showing the disposition thereof by the Circuit Court of Appeals, or within five days thereafter, to answer and obey whatever final order or judgment, and pay whatever fines or penalties assessed against them in said action and abide by whatever order shall be made in the premises and not depart said Court without leave thereof then this recognizance to be void; otherwise to remain in full force and effect. The conditions of this undertaking are such that the said Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue,
89 *has* been found guilty by the jury in the above entitled Court and a fine of one thousand ($1,000.00) Dollars has been imposed upon each of said parties, and the above entitled Court has fixed the amount of the bail of each of said defendants in the sum of Two Thousand ($2,000.00) Dollars, and the undersigned hereby, in accordance with the terms of this undertaking hereinbefore stated, to pay the fine of each or any of said defendants who

fail to appear and make payment hereof, should this judgment be affirmed or be liable in the sum of $2,000.00, the amount of the bond in each individual case.

CHARLES McKELVEY,
Principal.
CHARLES WARREN,
Principal.
E. J. BATES,
Principal.
RUDOLPH LEHMAN,
Principal.
EMMETT DONAHUE,
Principal.
CHARLES F. BAKER,
Surety.
A. B. REED,
Surety,
SCOTT VAUGHT,
Surety,
CLAY VANCE,
Surety,
90 C. C. DAVISON,
Surety,

UNITED STATES OF AMERICA,
Eastern Division,
District of Idaho, ss:

Charles F. Baker, a surety on the annexed bail, being duly sworn, deposes and says: That he is a freeholder in the County of Custer, State of Idaho; that he is worth the sum of Fifteen Thousand and no 100 ($15,000.00) Dollars, over and above all his just debts and liabilities in property, subject to execution and sale, and that his property consists of real property, to-wit: Drug Store and stock of drugs and real estate in the City of Mackay, Idaho, and money loaned on mortgages and liberty bonds.

CHARLES F. BAKER.

Subscribed and sworn to before me this 19th day of October, 1920.
W. D. McREYNOLDS,
Clerk U. S. District Court.

UNITED STATES OF AMERICA,
Eastern Division,
District of Idaho, ss:

A. B. Reed, a surety on the annexed bail, being duly sworn deposes and says: That he resides at Mackay, Custer County, in said District of Idaho; that he is a freeholder in the County of Custer, State of Idaho; that he is worth the sum of Ten Thousand
91 ($10,000.00) Dollars, over and above all his just debts and liabilities in property, subject to execution and sale, and that

his property consists of real property, to-wit: Mining property and oil stock — Custer County, and money loaned on liberty bonds.

A. B. REED.

Subscribed and sworn to before me this 19th day of October, 1920.

W. D. McREYNOLDS,
Clerk U. S. District Court.

UNITED STATES OF AMERICA,
Eastern Division,
District of Idaho, ss:

Scott Vaught, a surety on the annexed bail, being duly sworn deposes and says: That he resides at Mackay, Custer County, in said District of Idaho; that he is a freeholder in the County of Custer, State of Idaho; that he is worth the sum of Twenty-five Thousand ($25,000.00) Dollars, over and above all his just debts and liabilities in property, subject to execution and sale, and that his property consists of farm lands located in Custer County, live stock and liberty bonds.

SCOTT VAUGHT.

Subscribed and sworn to before me this 19th day of October, 1920.

W. D. McREYNOLDS,
Clerk U. S. District Court.

92 UNITED STATES OF AMERICA,
Eastern Division,
District of Idaho, ss:

Clay Vance, a surety on the annexed bail, being duly sworn deposes and says: That he resides at Mackay, Custer County, in said District of Idaho; that he is a freeholder in the County of Custer, State of Idaho; that he is worth the sum of Fifty Thousand ($50,000.00) Dollars, over and above all his just debts and liabilities in property, subject to execution and sale, and that his property consists of real property, to-wit: Farm lands and residence in the City of Mackay, Idaho and money loaned on mortgages and liberty bonds.

CLAY VANCE.

Subscribed and sworn to before me this 19th day of October, 1920.

W. D. McREYNOLDS,
Clerk U. S. District Court.

UNITED STATES OF AMERICA,
Eastern Division,
District of Idaho, ss:

C. C. Davidson, a surety on the annexed bail, being duly sworn, deposes and says: That he resides at Mackay, Custer County, in said District of Idaho; that he is a freeholder in the County of Custer, State of Idaho; that he is worth the sum of Fifty Thousand ($50,-

000.00) Dollars, over and above all his just debts and liabili-
93 ties in property, subject to execution and sale, and that his property consists of real property, to-wit: A residence in the City of Mackay, Idaho, bank stock and money loaned on mortgages and liberty bonds.

C. C. DAVIDSON.

Subscribed and sworn to before me this 19th day of October, 1920.

W. D. McREYNOLDS,
Clerk U. S. District Court.

Approved:

DIETRICH,
Judge.

Oct. 19, 1920.

Endorsed: Filed Oct. 19, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Order Granting Writ of Error.

Criminal.

On motion of J. M. Stevens, Chase A. Clark and Solon B. Clark, counsel for the above named defendants,

It is hereby ordered, that a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit, from the judgment heretofore rendered and entered herein, be, and the same is hereby granted and allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Clerk of the said Circuit Court of
94 Appeals of the United States for the Ninth Circuit.

It is further ordered that the said defendants be and they are hereby admitted to bail in the sum of $2,000.00, pending the termination of said proceedings in error conditioned according to law, the same to act as a supersedeas bond.

Dated this the 19th day of October, 1920.

FRANK S. DIETRICH,
Judge of the United States District Court, District of Idaho.

Endorsed: Filed Oct. 19, 1920. W. D. McReynolds, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Criminal. No. 591.

UNITED STATES OF AMERICA

vs.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN and EMMETT DONAHUE, Defendants.

Writ of Error.

UNITED STATES OF AMERICA,
Ninth Judicial District, ss:

The President of the United States to the Honorable Judge of
95 the District Court of the United States for the District of Idaho, Greeting:

Because in record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between the United States of America and Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lerman and Emmett Donarue, defendants, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in said Circuit on the 20th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 19th day of October, A. D., 1920, and in the 145th year of the independence of the United States of America.

96 Allowed by Frank S. Dietrich, United States District Judge

FRANK S. DIETRICH,
Judge.

Attest:
[SEAL.]

W. D. McREYNOLDS,
Clerk of the District Court of the United States, District of Idaho.

Service acknowledged and a copy received this 19th day of October, 1920.

J. L. McCLEAR,
U. S. District Attorney.
J. R. SMEAD,
Assistant U. S. Attorney.

Endorsed: Filed Oct. 19, 1920. W. D. McReynolds, Clerk.

In the United States District Court, Eastern Division, District of Idaho.

Criminal. No. 591.

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN and EMMETT DONAHUE, Defendants.

Citation of Error.

UNITED STATES OF AMERICA,
Eastern Division,
District of Idaho, ss:

97 To the United States of America, the above-named plaintiff, and J. L. McClear, Esq., United States District Attorney for the District of Idaho, Council for the above-named plaintiff:

You are hereby cited and admonished to be and appear in the Circuit Court of Appeals of the United States for the Ninth Circuit to be held in the City of San Francisco, State of California on the 20th day of November, A. D., 1920, pursuant to an order allowing a writ of error filed and entered in the Clerk's office of the District Court of the United States for the Eastern Division, District of Idaho, from a final judgment rendered, signed, filed and entered upon the 19th day of October, 1920, in that certain action, criminal, wherein Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue are plaintiffs in error and the United States of America is defendant in error, to show cause, if any there be, why the said judgment so rendered, signed, filed and entered against said plaintiffs in error, as in said order allowing said writ of error mentioned should not be reversed and why justice should not be done to and between the parties in that behalf.

Witness, the Honorable F. S. Dietrich, United States District Judge, District of Idaho, this the 19th day of October, 1920, and of the independence of the United States of America, the one hundred and forty-fourth.

98

FRANK S. DIETRICH,
United States District Judge.

Endorsed: Filed Oct. 19, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Stipulation for Record on Return of Writ of Error.

It is hereby stipulated, by and between the respective parties to the above entitled cause through their attorneys of record that the following portions only of the record in said cause shall be certified by the Clerk of the above entitled Court to the United States Circuit Court of Appeals for the Ninth Judicial Circuit in response to the writ of error herein, to-wit:

1. Indictment.
2. Motion to dismiss.
3. Demurrer to Indictment.
4. Minute Entry of Clerk showing overruling of Demurrer to Indictment and Exception thereto by defendants.
5. Minute Entry of Clerk showing plea of Defendants, together with all other minute entries.
6. Verdict of Jury.
7. Motion in Arrest of Judgment.
8. Judgment.
9. Bill of Exceptions.

99 10. Certified copy of plats of Township- Seven and Eight North, Range Twenty-two East Boise Meridian, Introduced in evidence.

11. All Stipulations entered into by the attorneys for the respective parties, and filed.
12. Motion in arrest of Judgment.
13. Petition for Writ of Error.
14. Assignment of Errors.
15. Bail on Writ of Error.
16. Writ of Error.
17. Return to Writ of Error.
18. Certificate of Clerk.
19. Citation.
20. Order for Writ of Error.
21. Præcipe.

J. L. McCLEAR,
United States District Attorney, District of Idaho;
J. R. SMEAD,
Assistant United States District Attorney,
District of Idaho,
Attorneys for Plaintiff.

Residence and Post Office Address, Boise, Idaho.

CHASE A. CLARKE,
SOLON B. CLARK,
Attorneys for Defendants.

Residence and Post Office Address, Mackay, Idaho.

Endorsed: Filed Dec. 10, 1920. W. D. McReynolds, Clerk.

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100 (Title of Court and Cause.)

Præcipe to Clerk.

To Honorable W. D. McReynolds, clerk of the above-entitled court:

In response to the Writ of Error in the above entitled cause, you are hereby requested to transmit to the United States Circuit Court of Appeals, those portions of the record in said cause, which are specified in the foregoing stipulation, with title page, index and certificate, as required by the rules of said Court and the rules of the United States Circuit Court of Appeals.

CHASE A. CLARK,
SOLON B. CLARK,
Attorneys for Defendants.

Endorsed: Filed Dec. 10, 1920. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

Clerk's Certificate.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 101, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

101 & 102 I further certify that the cost of the record herein amounts to the sum of $144.20, and that the same has been paid by the Plaintiffs in Error.

Witness my hand and the seal of said court this 29th day of December, 1920.

[SEAL.] W. D. McREYNOLDS,
Clerk.

[Endorsed:] Printed Transcript of Record. Filed January 3, 1921. F. D. Monckton, Clerk.

103 & 104 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. Bates, Rudolph Lehman, and Emmett Donahue, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Upon Writ of Error from the United States District Court for the District of Idaho, Eastern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

105 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the twenty-first day of February, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; the Honorable William H. Hunt, Circuit Judge; the Honorable Charles E. Wolverton, District Judge.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. Bates, Rudolph Lehman, and Emmett Donahue, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Order of Submission.

Ordered above-entitled cause argued by Mr. Chase A. Clark, counsel for the plaintiffs in error, and by Mr. J. R. Smead, Assistant United States Attorney and counsel for the defendant in error, and submitted to the Court for consideration and decision.

106 At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the second day of May, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable William B. Gilbert, Senior Circuit Judge, Presiding; the Honorable Erskine M. Ross, Circuit Judge; the Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue, Plaintiffs in Error, vs. The United States of America, Defendant in Error. No. 3622.

107 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. Bates, Rudolph Lehman and Emmett Donahue, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writ of Error from the United States District Court for the District of Idaho, Eastern Division.

Before Gilbert and Hunt, Circuit Judges, and Wolverton, District Judge.

HUNT, *Judge:*

Defendants below brought writ of error to review their conviction of having prevented and obstructed free passage over and through certain described public unoccupied lands of the United States, the obstruction being accomplished by force, threats and intimidation. The indictment charged that the defendants did wilfully and unlawfully, by means of force, threats and intimidation and other

unlawful means, prevent and obstruct certain persons * * *
from having and enjoying free passage over and through
108 certain public unoccupied land of the United States of
America, to wit: * * * that they * * * did then and there forcibly and unlawfully make an assault with firearms * * * upon the said * * * who were then and there attempting peaceably to pass over and through said aforesaid public lands of the United States, and did then and there threaten to injure the said * * * if they should not then and there desist in passing and attempting to pass over and through said public land * * * or should endeavor again to go upon said public lands, all of which things were done * * *. for the purpose of preventing and obstructing the said * * * from passing over and through the said public lands and by means of which said forcible assaults and threats the said * * * did then and there intimidate the said * * * and did then and there force them to desist from passing on, over and through said public land, etc.

There was evidence that about August 25th certain men in charge of some bands of sheep were driving them down on the left side of Big Lost River toward Mackay, Idaho; that some of the defendants, Lehman and Warren, told the man in charge of the sheep that they would have to move as it was a cattle range; that the sheepmen told the defendants that they would have to get orders from the owners of the sheep; that later that day defendant Bates told the sheepmen
to move right away and with others who were armed made
109 threats and demonstrations of force. On the morning of
the 26th defendant Bates went to the sheep camp and asked the man in charge of the sheep if they were going to move. The sheepman replied that they were going on the side of the river they were on toward the trail they always used between the ranches and the forest reserve, whereupon defendant Bates said they could not go through there. Thereupon Bates told the sheepman something would happen to him. Later Tom Donahue (who was discharged on motion of the United States Attorney), McKelvey, Warren and one other met the sheepmen, and E. Donahue, T. Donahue, McKelvey and another scared the horses of the sheepmen, rode into camp, and told the sheepmen to hold up their hands. The men obeyed. The visiting party commenced to shoot, and wounded one of the sheepmen. Further threats were then made by Emmet Donahue and Bates and Lehman. Some of the defendants then ordered the sheepmen to pack the horses and move everything, sheep and men. The sheepmen then drove the sheep down across the river.

According to the plats of the land office, and as testified to by the register of the United States Land Office at Haley, Idaho, the land where the trouble occurred was public land not entered, and the land over which the sheepmen proposed to drive the sheep was vacant and unentered public land lying between a forest reserve and certain occupied lands in the river valley.

The question of the sufficiency of the indictment is pre-
110 sented by a contention that the act charged does not come
within the scope and meaning of section 3 of the Act of

Congress of February 25, 1885, entitled "An Act to prevent unlawful occupancy of the public lands," 23 Stat. 322, and that the indictment does not negative the proviso contained in section 3 of the Act of Congress referred to.

By section 1 of the act it is provided,

"That all enclosures of any public lands heretofore or to be hereafter made by any person making or controlling the enclosure having no claim or color of title made or acquired in good faith, or an asserted right thereof at the proper land office under the general laws of the United States at the time of any such enclosure was or shall be made, are hereby declared to be unlawful and the maintenance, erection, construction or control of any such enclosure, is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim, color of title or asserted right as above specified as to enclosures is likewise declared unlawful and hereby prohibited."

Section 2 makes it the duty of the District Attorney to proceed in the cases where it is brought to his attention that section 1 of the act is being violated.

Section 3 under which the indictment is drawn provides:

111 "No person, by force, threats, intimidation, or by any fencing or enclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: Provided, this section shall not be held to affect the right or title of persons who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith." (23 Stat. 322.)

Section 4 provides that "any person violating the provisions of the act whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise or assist in any violation shall be deemed guilty of a misdemeanor," etc.

It is argued that the only acts prohibited by the act are those of occupancy of the public lands "which amount in fact to an enclosure" and that the acts condemned must in effect amount to a public nuisance as distinguished from a private nuisance, except that under section 3 it is unlawful for any person to prevent or obstruct any other person from going upon the public land to establish a residence or settlement under the land laws.

Our opinion is that the act under which the conviction
112 was had is broader in its purpose than plaintiffs in error regard it. The clauses of section 1 are limited to enclosures, or to what are in effect enclosures; but section 3 lays down a rule of conduct that no person by himself or in combination with others shall prevent or obstruct any person not only from peaceably entering

upon any tract of public land, and that no person shall prevent or obstruct free passage or transit over or through the public lands, except as provided where entry has been made under the land laws in good faith.

It is proper to recall that at the time the act was passed the general policy of Congress was in recognition of an implied license that until the Government might object the public lands adapted to livestock growing and not held under claim of title should be free for all persons to pass over and through. Buford vs. Hontz, 133 U. S. 320. The act may therefore be regarded as expressive of the determination of Congress to preserve that policy by making (section 1) the physical thing, an enclosure of the public lands, unlawful; by prohibiting the maintenance, erection, construction or control of such enclosure; by prohibiting the assertion of right to the exclusive use and occupancy of any part of the public land without claim or color of title as to the enclosure; by prohibiting (section 3) any person by force, threats or intimidation or by fencing or enclosing from preventing or obstructing anyone from peaceably going upon the public lands or settling thereon under the land laws; by prohibiting any person from preventing or obstructing
113 free passage or transit over the public lands.

It seems clear that if one not himself in good faith claiming a right under the land laws, or not in lawful authority, by the use of firearms intimidates a person or orders him not to cross over the unoccupied public lands, he obstructs free passage over such lands, and so violates the provisions of section 3 of the law and is liable to any punishment, if any has been provided, by the penalty provision, which is section 4.

Section 4 should not be construed too narrowly or in a way to nullify the words which make the section applicable to any person who violates the provisions of the act or who aids and abets in any violation thereof. In providing that "any person" who violates any provision of the act "whether as owner, part owner or agent" is to be deemed guilty, the legislative body did not intend to restrain the applicability of the generality of the words "any person" to such only as are specifically enumerated, as would have been the case if the clause contained the videlicet which is used to limit or qualify the generality of the preceding term. Voeghdly vs. School Directors, 1 Pa. St. 330. As the evident intent of the whole Act was to protect the public lands in order that persons might lawfully occupy or pass over them, it is not to be supposed that one who has no pretended claim of right or ownership or agency can by threats and intimidation prevent one from driving stock across the public
114 lands, and yet escape liability upon the ground that he is excluded as not within the enumerated classes although he comes within the general category of any persons violating the act. The Supreme Court in Ash Sheep Co. vs. United States, 252 U. S. 159, has recently said:

"The admitted rule that penal statutes are to be strictly construed, is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction

best harmonizes with the context, and most fully promotes the policy and objects of the legislature."

In Omaechevarria vs. Idaho, 246 U. S. 343, cited by plaintiffs in error, no decision was had upon a statute preventing passage over the public lands; nor did the Supreme Court analyze section 3 of the act here involved. The opinion emphasizes the fact that the Idaho statute there discussed makes no attempt to grant a right to use public lands "but merely excludes sheep from certain ranges under certain circumstances," and was a valid exercise of police power by the state. If the case has any relevancy to the present controversy it is in the fact that the Court regarded the entire act as showing that part of section 1 sought to prohibit the assertion of an exclusive right of way or occupation by force or intimidation or by what would be equivalent in effect to an enclosure. From such a standpoint, the opinion by Justice Brandeis might be cited in support of an argument that even under a very restricted construction one who
115 without claim of right and with arms intimidates another who is driving stock across the public lands and compels him to seek another route, is in effect asserting a right of control or of qualified ownership of right to use part of the public lands.

The register of the United States Land Office testified concerning certain official plats of townships in which the public lands in question were situated. We think they were competent as tending to prove whether the particular lands described in the indictment were public lands of the United States or had been entered and were private. The fact that a part of two townships shown upon the plats was owned privately did not affect the competency of the testimony with respect to the lands described in the indictment and related to the case on trial.

Nor is there substantial ground for the contention that the evidence failed to show that the defendants nor any of them were connected with the offense charged. The evidence amply sustains the verdict as against all who were convicted.

The constitutionality of that portion of section 3 of the act under which the indictment was found is questioned upon the ground that it not only covers cases which it is within the power of Congress to act upon, but also cases in which Congress has not the power to act upon. But the question presented by the record pertains to the power of Congress to pass the statute which prohibits the do-
116 ing of the things charged against plaintiff in error. To that there can be but one answer. That Congress can exercise control over the public lands is thoroughly well established. Sec. 3, Art. IV, Constitution. And surely Congress may exercise power necessary for the protection of the public lands including as an incident the prosecution and punishment of persons who obstruct passage or transit over the public lands. Light vs. United States, 220 U. S. 535.

Plaintiffs in error assail the indictment as fatally defective because it did not negative the proviso contained in section 3 of the act. The proviso, however, is not a component part of the definition of the

offense; hence it was not necessary to negative the proviso. United States vs. Cook, 84 U. S. 168; Ledbetter vs. United States, 170 U. S. 606; Robertson vs. United States, 262 Fed. 948; Stetson vs. United States, 257 Fed. 689; Jelke vs. United States, 255 Fed. 264; Grand Trunk R. Co. vs. United States, 229 Fed. 116.

We find no error in the record and affirm the judgment.

[Endorsed:] Opinion. Filed May 2, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

117 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. Bates, Rudolph Lehman, and Emmett Donahue, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the District of Idaho, Eastern Division.

Judgment U. S. Circuit Court of Appeals.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Eastern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed:] Judgment. Filed and entered May 2, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

118 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. Bates, Rudolph Lehman, and Emmett Donahue, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

one hundred and seventeen (117) pages, numbered from and including 1 to and including 117, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiffs in error, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

119 Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of May, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

120 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue are plaintiffs in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Idaho, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
121 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

122 [Endorsed:] File No. 28,337. Supreme Court of the United States, No. 382, October Term, 1921. Charles McKelvey et al. vs. The United States of America. Writ of Certiorari. Docketed. No. 3622. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 9, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

123 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, and EMMETT DONAHUE, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Stipulation as to Return to Writ of Certiorari.

Whereas, on the 22nd day of October, 1921, the Supreme Court of the United States, issued a Writ of Certiorari to the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit, wherein the said Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit, were commanded by the said Supreme Court to send up without delay the record and proceedings in that certain suit pending in said Circuit Court of Appeals, entitled, Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman, and Emmett Donahue, Plaintiffs in Error vs. The United States of America, Defendant in Error.

Now therefor it is stipulated and agreed, by and between counsel for Plaintiffs in Error, and counsel for Defendant in Error, that the Certified Transcript of Record on file in the Supreme Court of the United States, in that certain matter entitled, Charles McKelvey, Thomas Donahue, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue, Petitioners, vs. The United States of America, Respondent, can and may be taken as a return to said Writ of Certiorari and certified copies of this Stipulation be sent up by the Clerk of this Court, as his return to said Writ.

Dated this 5th day of November, 1921.

RALPH M. ADAIR,
Counsel for Plaintiffs in Error.

Res. and P. O. Address, Blackfoot, Idaho.

CHASE A. CLARK,
SOLON B. CLARK,
Counsel for Plaintiffs in Error.

Res. and P. O. Address, Mackay, Idaho.

JAMES W. BECK,
Solicitor General.

H.

[Endorsed:] Stipulation as to return to writ of certiorari. Filed November 30, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

124 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, and EMMETT DONAHUE, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari", filed in the above entitled cause on the 30th day of November, A. D. 1921, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

125 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3622.

CHARLES MCKELVEY, THOMAS DONAHUE, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, and EMMETT DONAHUE, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, com-

manding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari," in which said stipulation it is provided that the certified Transcript of the Record heretofore filed by the plaintiffs in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 30th day of November, A. D. 1921.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of November, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

126 [Endorsed:] Filed No. 28,337. Supreme Court U. S., October Term, 1921. Term No. 382. Charles McKelvey et al., Petitioners, vs. The United States of America. Writ of certiorari and return. Filed December 16, 1921.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

CHARLES McKELVEY, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, and EMMETT DONAHUE,

Petitioners,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

RALPH W. ADAIR,
CHASE A. CLARK,
SOLON B. CLARK,
Counsel For Petitioners.

Filed ..... 1921.

....., Clerk

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In the Supreme Court of the United States

CHARLES MCKELVEY, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, and EMMETT DONAHUE,
Petitioners,
vs
THE UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Charles McKelvey, Charles Warren, E. J. Bates, Rudolph Lehman and Emmett Donahue, respectfully represent, that on the 10th day of March, 1920, an indictment was found against them in The United States District Court for the District of Idaho, Eastern Division, the said indictment being based on an Act of Congress passed February 25, 1885 (23 Stat. 322) said indictment containing one count.

The defendants plead not guilty and on the 18th day of October, 1920, the jury in said case found a verdict convicting your petitioners of the offense charged.

The case was taken to the United States Circuit Court of Appeals for the Ninth Circuit, by your petitioners upon a Writ of Error, and was argued before the Court of Appeals on the 23rd day of February, 1921, the said Court being composed of, The Honorable William B. Gilbert, Senior Circuit Judge; The Honorable William H. Hunt, Circuit Judge and The Honorable Charles E. Wolverton, District Judge.

On the 2nd day of May, 1921, the said Circuit Court of Appeals handed down their decision in the case, sustaining the judgment.

Petitioners pray the Court for a Writ of Certiorari, and submit that this is a proper case for the granting of said Writ, and for the following, among other reasons:

I

The great importance of Section Three of the Act involved, to the livestock industries, State Governmental Agencies, and the legal profession in the Western and public land states and the great need for an authoritive decision clearly defining the scope of the Act in question.

Despite the fact that this Act has been upon the Statute Books for 35 years without amendment the Government has never before sought the application of the Act herein contended for, and there has been no other case based upon Section Three of the Act before this, or any of the Federal Courts.

The question is vital to the stock industries of the West. If the Act in question is to be taken literally and its scope is as wide and sweeping as contended for, the great mass of the range and livestock laws of these States are unenforceable. The enforcement of any of them would result directly in preventing free passage and transit over the public domain, and thus violate the provisions of the Act in question.

Upon an elucidating and authoritive decision upon the scope of this Act depends the enforcibility of our

State laws and the future legislative policy in regard to livestock industry protection.

II

There is a substantial conflict of decisions upon a vital and controlling matter of law involved in this case, between the decision of this Court in the case of Omaechevarria vs. Idaho, 62 Law Ed. 763, and the decision of the Circuit Court of Appeals for the Ninth Circuit, in this case, in respect to the construction of the Act of February 25, 1885.

III

Section 3 of the Act of February 25, 1885, (23 Stat. 322) is unconstitutional as including within its scope the prohibition of acts of personal violence, not directed against the United States, or against the territory or other property, belonging to the United States, and the constitutional cannot be separated from the unconstitutional part of said Section without adding qualifying terms.

The constitutionality of this Section of the Act has never been passed upon by this Court.

IV

There is a substantial conflict of decisions upon a vital and controlling matter of law involved in this case between the decisions of this Court in the case of Canfield vs. United States, 42 Law Ed. 260, and the decision of the Circuit Court of Appeals for the Ninth Circuit, in this case in respect to the scope of power granted to Congress by Section 3, Art. IV of the Constitution.

V

The Act in question is an unconstitutional usurpation of the police power of the States.

Every act of violence committed upon the public domain would necessarily prevent and obstruct free passage and transit over the public domain. The right of man to freely travel when and where he chooses is one of his inalienable rights to be protected by the States alone. The mere fact, that this right is violated by an act committed on the public domain gives the National Government no power to interfere.

VI

The indictment charges petitioners with preventing and obstructing certain named persons from having and enjoying free passage and transit over and through the public domain. The evidence shows, that the obstruction, if any there was, was not directed against the men, but against the sheep. Respondent's own evidence was that there was no objection to the men, personally, going any place they chose, but that all the acts were directed solely against the sheep.

The theory of the Government is, that as the men were with the sheep, if the sheep were prevented from passing, the men were also prevented from passing.

If this theory is correct a man may be charged with any crime ,and then by a process of deduction and relation be convicted of some other crime, connected with, or arising out of the crime charged.

Intent may be inferred, but where the prosecution's own evidence shows conclusively a different intent than

that charged, it overcomes any inference of intent to do the act charged.

VII

The trial court was without jurisdiction to pass sentence upon your petitioners, as there is no provision for any penalty against acts of this nature. Section 4 of the Act provides punishment for "owner, part owner, or agent." It is neither alleged, proven or inferred that any of these petitioners were acting in the capacity of owner, part owner, or agent.

VIII

Respondent at the trial was permitted, over objection, to introduce certain plats, shown on pages 58 and 59 of the record. The charge in the indictment was that, petitioners prevented free passage and transit.

> "Over certain public unoccupied lands of the United States of America, to-wit, those lands which are and will be included in Townships Seven and Eight, North Range Twenty-two East Boise Meridian."

The allegation was material, and instead of the plats proving the charge, they contradicted it, in that, they show most of the land to be forest reserve and patented land. The admission of these plats created a material variance between the indictment and the evidence, and deprived petitioners of their right to due process. They could not demur or move to make more specific. They had a right to rely on making a defense on this issue and on the assumption that respondent would be compelled

to prove that these townships were public, unoccupied lands.

IX

The indictment charges no offense against the United States for the reason that it does not negative the proviso contained in the later part of said Section 3 of the Act in question.

For these and other reasons indicated in the argument and brief accompanying this petition and submitted by petitioners in support of their petition, we ask that the Writ be granted.

Counsel represent to the Court that if said Writ be granted, they firmly believe they will be able to demonstrate to this Court, not only that the act charged in the indictment herein, does not come within the scope of the act in question, but that the Act is unconstitutional, and it is so important that there be at least one decision of this Court upon the Section of the Act in question.

Your petitioners believe that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to for it's review and determination in conformity with the provision of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding the said Court to certify and send to this Court on

a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals, in the said case, entitled, Charles McKelvey, et al., plaintiffs in error, vs. The United States, defendant in error, Number 3622, to the end that the said case may be reviewed and determined by this Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper, and that the said judgment of the Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court. And your petitioners will ever pray.

STATE OF IDAHO)
) ss:
COUNTY OF CUSTER)

Solon B. Clark, being duly sworn, says, that he is of counsel for Charles McKelvey, Charles Warren, Rudolph Lehman, E. J. Bates and Emmett Donahue, the foregoing petitioners, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

SOLON B. CLARK,

Subscribed and sworn to before me this 24th day of June, 1921.

M. D. KILGORE,
Notary Public, residing
at Mackay, Custer
County, Idaho.

RALPH W. ADAIR,
Counsel for Petitioners
Res. and P. O. Address Blackfoot, Bingham County, Ida.

CHASE A. CLARK,

SOLON B. CLARK,
Counsel for petitioners
Res. and P. O. Address, Mackay, Ida.

BRIEF AND ARGUMENT.

Your petitioners respectfully submit the following argument and brief in support of the foregoing petition:

The indictment filed against petitioners charges that the defendants wilfully and unlawfully, by means of force, threats and intimidation and other unlawful means prevent and obstruct certain persons * * * from having and enjoying free passage over and through certain public unoccupied lands of the United States of America, to-wit * * * that they * * * did then and there, forcibly and unlawfully make an assault with firearms * * * upon the said * * * who were then and there attempting peaceably to pass over and through said aforesaid public lands of the United States and did then and there threaten to injure the said * * * if they should not then

and there desist in passing and attempting to pass over and through said public land * * * or should endeavor again to go upon said public lands all of which things were done * * * for the purpose of preventing and obstructing the said * * * from passing over and through the said public lands and by means of which said forcible assaults and threats the said * * * did then and there intimidate the said * * * and did then and there force them to desist from passing on, over and through said public lands, etc.

That portion of Section 3 of the Act of February 25, 1885 (23 Stat. 322) under which this indictment is brought, provides:

> "No person by force, threats, intimidation * * * shall prevent or obstruct free passage or transit over or through the public lands."

I

The indictment specifically charges a violation of this portion of the Section, but it can be seen very clearly that even so, all that is charged is an assault with a deadly weapon, committed upon the public domain; the part of the charge alleging obstruction to free passage and transit over the public domain is in the nature of a conclusion and surplusage, as it follows as a matter of course, that any assault with a deadly weapon committed upon the public domain would prevent and obstruct free passage and transit over and through the

Our contention is, that the act charged does not come

within the scope and meaning of Section 3, of this Act, that it was only the intent of Congress to legislate against acts of occupancy of the public lands, which in themselves amount to an inclosure; such as would be continuing and prevent the public generally from enjoying free passage and transit over the public lands; that acts of personal violence directed against single individuals are not within its provisions; that Congress did not intend by one sweeping general provision isolated and hidden away in the "Fence Law" to become sponsor for the general peace and quiet of the public domain; that they did not intend to make every act of force, threat or intimidation a Federal offense merely because it was committed upon the public domain, nor to usurp the entire police power of the State. Quite clearly the first part of Section 3 prohibits a single act against any individual who is going upon the public land to make settlement, while the latter part of the Section only legislates against a thing, an obstruction or inclosure. The first part of the Act provides against obstructing any "person" while the later part of the Section provides against the obstruction of free passage or transit, and when the causes for its passage and the evils sought to be remedied are taken into consideration, we respectfully contend that the entire Act is aimed solely at enclosures and not against acts of the nature here charged. The whole history of the Act in its entirety and the court decisions thereon show that Congress was aiming at acts of enclosure which prevented settlement of the public lands and interfered with the paramount title

of the United States to its property, and was not intended as an assumption of exclusive police supervision of the entire public domain. In the following cases and especially the Omaechevarria case this Court has gone very fully into the purposes and intent of the Act of February 25, 1885, and from our understanding of these decisions this Court has held that the Act as a whole applied only to enclosures:

Omaechevarria vs. Idaho, 246 U. S. 343; 62 Law Ed. 763;

Canfield vs. United States, 167 U. S. 518; 42 Law Ed. 260;

Cameron vs. United States, 148 U. S. 301, 37 Law Ed. 459;

While Section 3 of this Act has never been singled out and specifically passed upon by the Court we are confident that if the Writ applied for be granted and we are permitted to fully present this issue that we will be able to demonstrate to this Court that the portion of the Act (Sec. 3) under which we are charged only applies to enclosures and the indictment in this case, not charging us with maintaining an enclosure but only with an assault with a deadly weapon, does not state a public offense against petitioners.

Respondent's contention is that the Act should be literally construed and is as wide and sweeping as its very terms; in order to sustain this conviction Section 3 must be so construed, for we are charged with an assault with a deadly weapon. To sustain this charge, the literal wording of the Section must be taken, without re-

gard to the evils sought to be remedied, without taking into consideration the intent of Congress or any of the matters usually taken into consideration in construing Statutes.

If respondent's contention is correct then, the Federal Statute does cover the acts herein charged, and the result is wholly disastrous to the many range and livestock laws which are in force in the Western and public land states and which for years have protected and upheld the livestock industries of the States and preserved the tranquility of the ranges. The enforcement of each and every one of these laws prevents and obstructs free passage and transit of certain individuals over the public domain. Any Peace Officer of the State of Idaho arresting a man charged with any offense or enforcing the State laws could be charged in the very identical language of this indictment, and further under the construction sought for by respondent, he could be convicted and punished.

Section 1908, Idaho Compiled Statutes:

> "1908 (1217) Herding within two mile limit prohibited. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded on the land or possessory claims of other persons, or to herd the same or permit them to graze within 2 miles of the dwelling house of the owner or owners of such possessory claim."

This Statute was held constitutional, and the urgent necessities for passing it were reviewed by this Court

in the case of Bacon vs. Walker, 204 U. S. 311. The Act itself forbids free passage and transit over the public lands; the Courts of the State and its peace officers are violating the literal provisions of the Federal Act in question in enforcing this State Law; the homesteader who admonishes the sheep man that he will hale him into court in case of violation of its provisions is preventing free passage and transit by threats and intimidation.

Section 8333, Idaho Compiled Statutes:

> "8333. (6872) Grazing sheep on cattle range. Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

This Statute has been held constitutional, and a legtimate exercise of the police powers of the State and not in conflict with the Federal Act in question in Omaechevarria vs. Idaho, 246 U. S. 343, yet under the construction sought for by respondent and sustained by the Circuit Court of Appeals, it prevents free passage and transit over the public lands. The State Peace Officers who under their authority prevent violations of this Statute by making arrests, and in some cases preventing

a violation of this State Statute, with force, and intimidation, directly violate the literal terms of this Federal Act in question, and can be charged **under the very terms of the indictment in this case.**

The range rider who admonishes the sheep man that he is entering upon the cattle range and will be arrested if he persists is guilty of preventing and obstructing free passage and transit over the public lands by threats and intimidation.

The State laws prohibiting the driving of diseased cattle, horses and sheep across the public domain and their enforcement in some cases by seizure and the use of force results directly and with the express purpose in view of preventing and obstructing free passage and transit.

The communities of the Western states derive their municipal water supply from springs and small streams in the mountains on the public lands; the crossing of these water sheds by large droves of stock pollute the waters, yet if the Act is given the liberal construction sought for, these communities would be unable to protect themselves.

We have called the court's attention to only a small portion of the State Range and Livestock laws, which do as a matter of course, prevent and obstruct free passage and transit over and through the public lands. The great mass of the territory lying within the boundaries of the State of Idaho, as well as a majority of the other Western States is unoccupied Public land. These States are

the great growers of livestock for the United States, and the raising of this stock is accomplished principaly by the use of the ranges; the States in the exercise of their police powers have legislated to regulate these industries, and as these industries are conducted on the unoccupied public lands it follows as of course that all of this legislation prevents and obstructs free passage and transit.

The respondent in this case has sought the very extreme application of this Federal Act in question, the punishment of an assault with a deadly weapon. If the Act applies to the acts charged in the indictment, there is not one of our State Criminal Laws that can be enforced upon the public lands. If the Act in question only applies to enclosures as we understand this Court to hold in the Omaechevarria case then our State laws are all in harmony with this Section of the Act, and the indictment in this case does not state an offense under the Section in question and under which we are charged.

The attempt of the Government to apply the provisions of the Section of the Act in question to the charge here made has created a grave question in the Western States among the Livestock interests as to their futher right tc seek protection under the State laws and among the agencies of the State as to their further right to enforce these laws.

This issue is squarely raised in this case for if this Section of the Act applies to the charge here made it likewise affects the State laws and their enforcement. It is the first time since the passage of this law the Gov-

ernment has sought it's application and the application thus sought is of vital and far reaching importance.

We respectfully submit that on account of the foregoing conditions, the great importance of the matters involved, the fact that this Section of the Act is so revolutionary in it's literal construction, and has never before been before the Courts there is need for an authoritive decision upon its scope.

II

We quote from the decision of the Circuit Court of Appeals in this case from Page 112 of the copy of the record,

> "It is proper to recall that at the time the act was passed the general policy of Congress was in recognition of an implied license, that until the Government might object, the public lands adapted to livestock growing and not held under a claim of title should be free for all persons to pass over and through."

And our understanding of the decision of this Court in the case of Omaechevarria vs. Idaho, 246 United States 343; 62 Law Ed. 763, is that the States in the exercise of their police power may prevent and obstruct persons from passing over and through the public lands as was done by the State Statute under consideration in the Omaechevarria case.

We also quote from the said decision of the Circuit Court of Appeals from page 112:

> "The Causes of Section One are limited to enclosures or to what are in effect enclosures; that

> Section Three lays down a rule of conduct * * * that no person shall prevent or obstruct free passage or transit over or through the public lands, except as provided where entry had been made under the land laws in good faith."

Our understanding of the decision of this Court in the Omaechevarria case is that the Court had the entire Act of February 25, 1885 under consideration and held that it only applied to inclosures.

III

Our contention is that the portion of Section Three of the Act under which petitioners are charged in this case is unconstitutional upon the ground that it covers acts which it is constitutional for Congress to legislate against, and also Acts which it is unconstitutional for Congress to legislate against and two are incapable of separation and it would be necessary to insert words or terms to separate the constitutional from the unconstitutional part.

That Congress in passing the Act in question has gone beyond it's limited constitutional powers, has covered acts in this Section of the Statute which it has not the power to legislate against and comes solely within the police powers of the state is apparent.

We respectfully submit that Section 3, Article IV of the Constitution grants to Congress the power to pass such laws as will protect the United States in its proprietorship of the public lands but only such as would protect it in its capacity as proprietor, thus, against any injury to or unlawful claim to the land itself; as is

said by this Court in the case of Canfield vs. United States, 42 Law Ed. 260, Congress may exercise power over the public lands,

> "So long as such power is directed solely to its own protection."

The general police supervision conferred upon the United States by Section 3 of this Act certainly cannot be construed as a protection to the government as proprietor of the public lands, as a literal application of the Statute would enable the Federal Courts to take jurisdiction of any and all assaults including murder committed upon the public domain, for all of these certainly and as a matter of course prevent and obstruct free passage and transit over and through the public lands. The right of man to travel where and when he chooses upon the public domain is a right of personal liberty and is one of the rights of man, which it is the duty of the States of the Union under the Constitution to protect and is not a Federal Question, and Section 3 of Article IV of the Constitution does not empower Congress to protect these rights.

And yet under a literal construction of Section 3 of the Act in question, these rights are protected and their violation is prohibited.

Wilkerson vs. Rahrer, 35 Law Ed. 572;
Keller vs. United States, 53 Law Ed. 737;

The fact that there are prohibited acts covered by this Section of the Act which Congress has no power to legislate against, and the fact that they are inseparably

mingled in the same Section with acts which Congress has the power to legislate against, and the two cannot be separated without adding qualifying words or terms makes the whole unconstitutional.

United States vs. Hyrum Reese, et al., 23 Law Ed. 563.

The indictment in this case covering an Act which we contend Congress has no power to legislate against raises this constitutional question squarely and as the constitutionality of this Section of the Act in question has never been passed upon and as it involves the additional constitutional question raised in Paragraph Five hereof, we respectfully submit that there is need for an authoritive decision of this Court upon this question.

IV

We quote from the opinion of the Circuit Court of Appeals in this case on page 116 of the record:

> "That Congress can exercise control over the public lands is thoroughly well established, Section 3, Article IV Constitution. And surely Congress may exercise power necessary for the protection of public land including as an incident the prosecution and punishment of persons who obstruct passage or transit over the public lands."

As we understand the decision of this Court in the case of Canfield vs. United States, 42 Law Ed. 260 this Court limited Congress to passing acts under Section 3, Article IV of the Constitution to those, "directed solely for its own protection," while the decision of the Circuit Court of Appeals above quoted, holds the power

of Congress under this Section of the Constitution to be unlimited. V

The Act in question is also unconstitutional as being a usurpation of the police powers of the State. Under a literal construction of the Act in question the United States government has asserted an exclusive police control over the public domain. Under this Act they may punish murder, assaults of every name, nature and description, and every act of force, threat or intimidation committed upon the public domain, for each and all of these acts prevent and obstruct free passage and transit over and through public lands. The punishment of these acts is solely and at all times with the states, whether committed upon the public domain, in the cities or upon patented land. Laws punishing such acts as these are for the protection of the inalienable rights of man; to protect him in his life, liberty and pursuit of happiness, and the Constitution has left the protection of these rights in the hands of the states, and their usurpation by the National Government by the Act in question we submit makes it unconstitutional:

Wilkerson vs. Rahrer, 35 Law Ed. 572;
Keller vs. United States, 53 Law Ed. 737;

On account of the great importance of this question in relation to our Stock legislation, apparently in conflict with this Section, we submit that the need for a decision by the Court upon this issue is pressing. The question has never before been raised before this Court.

VI

The indictment specifically charges petitioners with preventing and obstructing certain named persons from having and enjoying free passage and transit over and through the public land; it also charges the acts to have been done with the specific intent of preventing these same certain named persons from having and enjoying free passage and transit over and through the public lands. The evidence, we take it, unquestionably shows that the only act which in any manner prevented any of the persons named from having and enjoying free passage and transit, was the firing of a shot by one of your petitioners, which struck one of the parties named and wounded him. There is not one iota of evidence from which it can even be inferred that any of your petitioners desired to, intended to, or did prevent either, all, or any of the persons named from passing or traveling any place at any time they desired to do so; the evidence in this particular not only fails to sustain the charge but overwhelmingly shows by the respondent's own witnesses that every act committed by these petitioners was directed solely against the sheep. That the single act of one of your petitioners in wounding one of the persons named in the indictment was more or less of an accident, and that whatever might have happened at the time of the shooting was merely an incident to the effort of petitioners to prevent the sheep from passing. We are wholly at a loss to see respondent's reasoning in its theory that these petitioners should have been convicted because of the fact that the sheep were pre-

vented from passing. We of course admit that there are many charges that very slight proof of which will shift the burden on the defendant, but it seems amazing to us to say that we may be charged specifically with one thing and convicted under that charge by proof that we not only intended to but did do something else. There is not only a material variance between the indictment and the proof in this respect, but there is a plain deprivation of due process of law. If this conviction will stand under the proof of the charge as made in this case, there is no defendant in a criminal case who can safely go to trial with any degree of certainty, as to whether he will be compelled upon to defend against the crime charged or some incidental act occurring at the time of or arising out of the crime charged.

VII

The trial court was without jurisdiction to pass sentence upon your petitioners. Section IV of the Act of February 25, 1885, and under which your petitioners were sentenced provides for the punishment of any person who as "owner, part owner or agent," violates the provisions of any of these sections. The penalty clause we submit must of course be strictly construed, and as petitioners are not charged as either, owner, part owner or agent, and there is no proof whatever that they did so act, we submit that this Section does not provide for their punishment. This question, of course is co-mingled to a certain extent with the issue raised in Paragraph One hereof, and it helps to show that Congress only intended to punish those and make the terms

of the Act applicable to those who maintained inclosures. The attempt to apply the provisions of this penalty section to the facts in this case, results in more or less of an absurdity.

We may ask Respondent in this case, what particular thing we are supposed to be the owners, or part owners of. If our contention is correct and Section 3 of the Act only applies to enclosures then Section IV quite naturally is in harmony with the rest of the Act and applies to owners of enclosures.

VIII

Respondent at the trial was permitted, over objection, to introduce certain plats, shown on pages 58 and 59 of the record. The charge in the indictment was that, petitioners prevented free passage and transit,

> "Over certain public unoccupied lands of the United States of America, to-wit, those lands which are and will be included in Townships Seven and Eight North, Range Twenty-two, East Boise Meridian."

The allegation was material, and instead of the plats proving the charge, they contradicted it, in that they show most of the land to be forest reserve and patented land. The admission of these plats created a material variance between the indictment and the evidence, and deprived petitioners of their right to due process. They could not demur or move to make more specific. They had a right to reply on making a defense on this issue and on the assumption that respondent would be com-

pelled to prove that these townships were public, unoccupied lands.

We respectfully submit that for the foregoing reasons, on account of the uncertainty now existing as to the extent to which the States may go in enforcing their range and livestock laws, and on account of the apparently sweeping provisions of the act in question, and the fact that it has never been passed upon nor the constitutionality determined by this Court, there is real need for a decision by this Court upon the issues raised.

Respectfully submitted.

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(28,337)

Supreme Court of the United States

OCTOBER TERM, 1921.

NO. 382.

CHARLES McKELVEY, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, and EMMETT DONAHUE,

Petitioners.

VS.

THE UNITED STATES OF AMERICA,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONERS.

STATEMENT OF CASE.

On the 10th day of March, 1920, indictment was filed in the District Court of the United States in and for the District of Idaho, Eastern Division, charging Petitioners with "obstruction of occupancy and travel on public lands" under the second portion of Section 3 of the Act

of Congress of February 25th, 1885, 23 Stat. 322; (Transcript of the Record Page 1). Thereafter Petitioners filed their Motion to Dismiss and Demurrer to the Indictment (Transcript of the Record Page 3), which were, by the court, over-ruled (Transcript of the Record Page 4). Petitioners pleaded not guilty, and the cause came on regularly to trial on the 15th day of October, 1920, before a jury.

The evidence of the Government, which is the only evidence incorporated in the transcript, was as follows:

One Pete Iphar, Bert Etchart and John Mallea had charge of a band of sheep belonging to the partnership of Biddegain and Etchacaher. Iphar was camp tender and the other two named were herders. Iphar began working with the sheep in the latter part of July, 1919, when they were about thirty miles northwest of the town of Mackay, Custer County, Idaho, (Transcript of the Record Pages 11 and 12). When the sheep were within eight or ten miles of the town of Mackay (Transcript of the Record Page 12), at eleven o'clock on the morning of August 25th, 1919, the petitioners, Lehman and Warren, advised Iphar and the herder that they would have to move the sheep across the river as they were on a cattle range (Transcript of the Record Page 12). Iphar objected to moving the sheep until it got cooler, and nothing further was done at that time (Transcript of the Record Page

12). At about 4 o'clock in the afternoon of the 25th of August, petitioners, Bates and Donahue, and another party, came back to where the sheep were and told them it was time to move the sheep, to which Iphar and the others with the sheep objected until they could get orders from Etchacaher (Transcript of the Record Pages 12 and 13). Petitioner Bates ran Mallea around a tree with his fist set, Iphar took his horse and went to look for Etchacaher, and petitioners, Bates and Donahue left the scene (Transcript of the Record Page 13). At about half past seven on the morning of August 26th, petitioner, Bates came back to the sheep camp, found Iphar alone there and objected to them taking the sheep over the old trail as Iphar testified (Transcript of the Record Page 13). Iphar went after the horses and met petitioners, Thomas Donahue, who was later discharged (Transcript of the Record Page 38), McKelvey and Warren, who said they wanted to get the sheep off (Transcript of the Record Page 14). Later, petitioners, Thomas Donahue, Emmett Donahue, McKelvey, and the Vaught boy and another man (Transcript of the Record Page 14), rode into camp, said "hands up" and started to shoot, firing two volleys. Iphar was shot. Petitioner Emmett Donahue told Iphar he should finish him. Petitioner Bates then rode up and was going to hit him with a fire shovel until told that Iphar was wounded. Petitioner Lehman then rode up and told Iphar they had got him, Lehman, in trouble

(Transcript of the Record Page 14). Neither petitioners, Bates or Lehman, being there when the shooting took place. Petitioners then took Iphar to an automobile and into town to a doctor. Iphar testified they intended going through a strip of country between the ranches and forest reserve. On cross examination, Iphar testified that the objections to going through this country were made to sheep (Transcript of the Record Pages 16 and 20).

Henry Larter testified that he was a stock man, and that he, in company with petitioners, Bates and Tom Donahue, asked Iphar to move the sheep off the range and then considered having Iphar and others responsible for the sheep arrested, under the range priority law (Transcript of the Record Pages 20 and 21), and on cross examination that their only object was to get the sheep off the cow range, and there was no objection to Iphar, Mallea or Etchart going wherever they desired (Transcript of the Record Page 21). John Moscho testified that he was herding another band of sheep that the cattle men drove across the river (Transcript of the Record Pages 25 and 26).

The Government introduced its evidence, including: Township plat of Townships Seven and Eight North, Range Twenty-two East Boise Meridian, which plats were admitted in evidence over the objection of petitioners (Pages 27 and 29 of the Transcript of Record) which rul-

ing was thereafter assigned as error, and the opinion of the Honorable Circuit Court of Appeals thereon is herein assigned as error.

The Government rested, and at the close thereof, petitioners demurred to the evidence so offered, as set forth, and moved for a non-suit (Pages 36 and 37 Transcript of the Record), which demurrer was, by the Court, overruled (Page 37, Transcript of the Record), which ruling was thereafter assigned as error.

Witnesses were thereupon examined for petitioners, and witnesses on behalf of the Government on rebuttal and witnesses on behalf of petitioners in sur-rebuttal, and both the Government and Petitioners rested; whereupon the petitioners renewed their motion including the same grounds as set out in the demurrer to the evidence at the close of the case of the Government (Pages 37 and 38 Transcript of Record), which motion was by the Court overruled (Page 38 Transcript of Record).

Whereupon the Government moved to dismiss the case as against Thomas Donahue, which motion was by the Court allowed (Transcript of the Record Page 38).

The Court then instructed the jury, the jury thereupon retired to consider their verdict, and returned into Court finding the petitioners guilty as charged in the indictment (Page 38 Transcript of Record), and on the 19th day of October, 1920, the petitioners were brought before

the Court for the pronouncement of judgment (Page 38 Transcript of the Record).

The petitioners at that time moved the Court for arrest of judgment (Transcript of Record Pages 7, 8 and 9), which motion was by the Court overruled.

The Court thereupon pronounced judgment against the petitioners (Pages 9 and 10 Transcript of the Record).

The cause was thereupon taken to the Circuit Court of Appeals for the Ninth Circuit, upon writ of error, and after presentation to the said Circuit Court of Appeals, an opinion upon said question was filed in said Circuit Court of Appeals, on the 2nd day of May, 1921 (Transcript of the Record Pages 52-57), and judgment was thereupon entered confirming said judgment, on the said 2nd day of May, 1921 (Transcript of the Record Page 57), which opinion and judgment we herewith beg to present for review.

SPECIFICATION OF ERRORS.

Petitoners specify the following errors:

I.

The Honorable Circuit Court of Appeals was in error in holding that the act charged in the indictment herein, comes within the scope and meaning of Section 3 of

Act of Congress of February 25th, 1885, entitled: "An Act to Prevent Unlawful Occupancy of the Public Lands," 23 Stat. 322, upon the ground that, that portion of Section 3 of said Statutes, under which this indictment was found, only prohibits obstructions, which in their nature, are continuous or permanent, and amount in fact to a public nuisance, as distinguished from an act of violence committed against an individual.

II.

The Honorable Circuit Court of Appeals was in error in holding that portion of Section 3 of the Act in question, under which petitioners were charged, to be constitutional, for the reason that said Court construed said portion of Section 3, under which your petitioners were convicted, as prohibiting every act of personal violence which obstructed the free passage and transit of an individual over the public lands, and thus bringing the act charged in the indictment, herein, within the scope and meaning of said portion of Section 3, and if this is the proper construction of that portion of Section 3 in question, then this part of Section 3 is unconstitutional and void for the reason that it includes within its scope, acts of personal violence not directed against, or affecting the United States as proprietor, or against or affecting the territory or other property belonging to the United States and the Constitutional can not be separated from

the unconstitutional part of said section without adding qualifying words, phrases, or terms.

III.

The Honorable Circuit Court of Appeals was in error in holding that portion of Section 3 of the Act in question, under which petitioners were convicted, to be constitutional, for the reason that said Court construed said portion of Section 3, under which your petitioners were charged, as prohibiting every act of personal violence which obstructed the free passage and transit of an individual over the public lands, thus bringing the act charged in the indictment, herein, within the scope and meaning of said portion of Section 3, and if this is the proper construction of that portion of Section 3 in question, then this part of Section 3 is unconstitutional and void for the reason that it usurps and infringes upon the police powers of the State, in this, that with such a construction placed upon the portion of the act in question, it prohibits acts which obstruct an individual in his right to travel freely when and where he chooses, and this right is one of the inalienable rights of man, to be protected by the States alone in the exercise of their police power.

IV.

The Honorable Circuit Court of Appeals was in error

in holding that the indictment stated an offense against your petitioners without negativing the proviso contained in said Section 3 of the Act.

V.

The Honorable Circuit Court of Appeals was in error in holding the official township plats introduced in evidence by the Government (Transcript of the Record Pages 27 and 28) competent evidence, for the reason that these plats created a fatal variance between the allegations of the indictment and the proofs, in this, that the indictment charged that the petitioners prevented free passage over certain public lands, to-wit: Townships Seven (7) and Eight (8), and the said plats introduced in evidence to prove this allegation, show upon their face that the greater portion of these townships was patented land and forest reserve, and not public unoccupied lands of the United States.

VI.

The Honorable Circuit Court of Appeals was in error in holding that the evidence was sufficient to show that the petitioners committed the offense charged, in this that the evidence wholly fails to show that petitioners prevented or obstructed the persons named in the indictment from having or enjoying free passage or transit, but, on the contrary, the evidence of the Government

proved conclusively that all of the acts committed by petitioners were directed against the sheep, and the indictment does not charge petitioners with preventing or obstructing the passage of sheep, but of certain persons therein named.

VII.

The Honorable Circuit Court of Appeals erred in holding that the trial court acted within its jurisdiction in passing sentence upon your petitioners, for the reason that Sec. 4, the penalty section of the Act in question, makes no provision for the punishment of anyone except one acting as "owner, part owner or agent," and the indictment does not charge and the proof does not even remotely tend to show that any or either of your petitioners were acting in the capacity of owner, part owner or agent.

ARGUMENT.

SPECIFICATION OF ERROR NO. I.

The indictment in this action charges "that the petitioners did wilfully and unlawfully, by means of force, threats and intimidation and other unlawful means, prevent and obstruct certain persons * * * from having and enjoying free passage over and through certain public unoccupied land of the United States of America, to-wit * * * that they * * * did then and there

forcibly and unlawfully make an assault with firearms * * * upon the said * * * who were then and there attempting peaceably to pass over and through said aforesaid public lands of the United States, and did then and there threaten to injure the said * * * if they should not then and there desist in passing and attempting to pass over and through said public land * * * or should endeavor again to go upon said public lands, all of which things were done * * * for the purpose of preventing and obstructing the said * * * from passing over and through the said public lands, and by means of which said forcible assaults and threats, the said * * * did then and there intimidate the said * * * and did then and there force them to desist from passing on, over and through said public land," etc.

It will be seen that the indictment charges absolutely nothing more than an isolated assault with deadly weapons upon certain individuals, whereby such individuals were obstructed in their passage over the public lands. The true charge is nothing more or less than that of assault with a deadly weapon, as any assault of this nature would naturally result in the obstruction of the person assaulted. The portion of Section 3 of the Act of February 25th, 1885, (23 Stat. 322) under which we are charged, is as follows:

"No person, by force, threats, intimidation,

or by any fence or inclosing, or any other unlawful means * * * shall prevent or obstruct free passage or transit over or through the public lands:"

This specification runs solely to the sufficiency of the indictment to state an offense against your petitioners; we contend that the act charged in the indictment does not come within the scope, meaning or prohibition of the portion of Section 3 above cited, and that therefore, the indictment is not based upon any violation of any of the laws of the United States, and for this reason does not state facts sufficient to charge any offense. We contend that Congress only intended, and the Act in its very terms only prohibits acts or things which, in their nature, and of themselves, prevent or obstruct the "free passage and transit" of the public generally, over the public lands, and that it does not prohibit or make punishable a single act of violence directed against a particular individual, such as an assault with a deadly weapon, as herein charged. That said portion of the Act only legislates against the maintenance of what is in effect a public nuisance and was not intended to cover every breach of the peace directed against a particular individual, even though such an act prevented and obstructed the individual from having and enjoying free passage and transit over or through the public lands.

Our contention is this: That if a man builds a drift

fence for a hundred yards across the mouth of a narrow canyon, or in front of a ford across a stream, so that all persons and live stock are obstructed or prevented from passing, this man is guilty of obstructing or preventing free passage or transit, under the terms of this portion of the section. But if I have a quarrel with a man upon the public lands, and in this quarrel I shoot him, and by shooting him, prevent him, the individual, from passing over the public lands, I have not prevented or obstructed "free passage and transit" over the public domain, within the intent and meaning of this portion of the Act, but have only committed the crime of assault with a deadly weapon, as defined by the criminal laws of the State.

The first portion of the section provides: "No person * * * shall * * * prevent or obstruct any person * * *." The second portion of this act provides: "No person * * * shall prevent or obstruct free passage or transit * * *." We respectfully submit that the two prohibitions therein contained are not only in their terms, but in their nature, entirely different. The first portion prohibits the obstruction of "*persons.*" The second portion prohibits the obstruction of "*free passage and transit.*" In order to bring the assault herein charged within the meaning of the second portion of this section, it would be necessary to reconstruct this prohibition to read: "or shall prevent or obstruct any person from having and

enjoying free passage and transit." The phrases being in their very terms so entirely distinct and different, being used in the same sentence, and conveying to the mind an entirely different meaning, we surely can not impute to Congress the purpose or intent to make the section read as above suggested.

The first portion of the section prohibits an assault with a deadly weapon, as well as any other single act committed upon any particular individual, who is passing through with the purpose or intent of establishing settlement or residence upon the public lands. Now, if the second portion of the section prohibits an assault upon a particular individual, who is passing over the public lands without regard to such individual's purpose or intent in passing, such as this indictment charges, then the first portion of Section 3 is meaningless, useless and surplusage; the second portion of Section 3, under which we are charged, under such a construction, is merely a reiteration of the specific prohibitions contained in the first clause. If this portion of Section 3 has this application, then the entire section would have the same force and effect as any law which would provide that "It is unlawful to steal a black horse, and it is also unlawful to steal any horse."

The indictment itself is an excellent demonstration

of the point, for if a charge were incorporated into the terms of this indictment, that the persons assaulted were at the time passing through the public lands to "make settlement," we take it that the indictment then would very perfectly state an offense under the first clause of the section.

We respectfully submit that by its very terms, Section 3 of the Act in question, does not legislate against an individual assault unless the person assaulted is passing through the public lands with a specific purpose in view, that is, to make entry or settlement, that the Act is only directed against a thing, which prevents or obstructs all persons who attempt to pass, and also would obstruct everyone who might attempt to pass; the thing or obstruction might be a constructed obstacle, such as a fence, or might result in a series of acts directed not against a single individual, but against everyone who desired to pass, our point being that to come under the terms of the second portion of Section 3, the obstruction must result in something which is directed against and would affect the public generally, and in this regard, we beg to call the Court's attention to the fact that the act herein charged, as specified in the indictment, could not, and would not, and was not designed to affect any other person in the world than the individuals named in the indictment.

While it is our contention that the very terms of the Act itself are plain and specific enough in themselves, to bear out our contention, yet, as additional support to this contention, we respectfully submit it was the intention of Congress in passing the Act, to cover only things which affected the public.

> "* * * large and oftentimes foreign corporations deliberately inclose by fences, areas of hundreds of thousands of acres, inclosing the avenues of travel, and preventing the occupancy by those seeking homes." Report of the Committee on Public Lands of the Senate, January 12th, 1885.

The Act itself literally follows this report of the committee. Section one prohibits large corporations from deliberately inclosing "by fences areas of hundreds of thousands of acres." The first portion of Section 3 of the Act, prohibits any person from "preventing the occupancy by those seeking homes," and the second portion of Section 3, under which we are charged, prevents "inclosing the avenues of travel," that is, prohibits any person from preventing or obstructing "free passage and transit over or through the public lands."

We respectfully submit that every assault or act of violence committed upon the public domain would prevent or obstruct directly as a natural consequence, the person against whom the assault or act of violence was directed from having and enjoying free passage and

transit over or through the public lands, and that Congress never intended to become sponsor for the peace and quiet of the public lands, or to assume exclusive police jurisdiction over them by this one general clause incorporated into Section 3 of what is commonly known as the "fence law." If it had been so intended, some mention surely would be made of it in the Committee Reports, and the Act would have been worded entirely different.

The scope and meaning of this Act has never been directly passed upon, yet where the question has arisen, the Courts have never intimated the application of the Act sought for in these proceedings, but have suggested the application of the Act to such things or obstructions as would only affect the public.

> "It would be correct, for instance, to invoke Section 3 as against one who has a piece of drift fence but no inclosure whatsoever, provided such a fence is an obstruction to entry or settlement or prevents free passage over the public lands;" Golconda Cattle Co., v. United States, 201 Fed. 281.

> "The trial court found that the fence was so built that in combination with natural barriers it constituted a complete obstruction to the passage of range stock from the township East into Township 138." Stoddard v. United States 214 Fed. 566.

Thus, in the last case cited and in the example re-

ferred to in the other case, these fences would prevent or obstruct everyone who attempted to pass, would inclose or obstruct the avenues of travel, and thus "prevent or obstruct free passage and transit."

While not controlling, it is sometimes said by the Courts that the construction placed on legislative acts by the executive branch of the Government, is an aid in determining the intent and purpose of the Act. This Act has been upon the Statute books for thirty-five years. During this thirty-five years there have been quarrels, range wars, murders and assaults of almost every kind and nature conceivable, all of which prevented certain individuals from having and enjoying free passage and transit over and through the public domain, but we have been unable to find a case wherein the executive branch of the Government has ever sought to punish these acts under this section; we have been unable to find any court decision which would even hint at such an application of this Act, and we are unable to find any intimation on the part of Congress, either through Committee Reports, or in the terms of the act itself, that this portion of Section 3 in question was even designed or aimed at an assault with a deadly weapon committed upon an individual, and which could and did only affect such individual.

We most respectfully submit that if any person or corporation builds a drift fence across an avenue of travel

used by man or live stock, such as across the mouth of a narrow canyon, or ford across a stream or mountain trail; or if such person or corporation places an armed guard at these points to drive back any live stock that might attempt to pass that way, and to warn all persons not to pass; or if such person or corporation places warning signs at these points, warning all persons against trespassing, then such person or corporation prevents and obstructs "free passage and transit over the public lands" within the very terms of the Act, and the intent of Congress. But if a person has a quarrel with another on the public land, and commits an assault upon him, or murders him, then such person is not guilty of preventing free passage and transit within the terms of the Act unless the person assaulted is going upon the public lands to make settlement or establish residence, and the indictment in this case, having failed to allege that the persons assaulted were passing through to make settlement or residence, does not state facts sufficient to constitute an offense.

In the case of Camfield v. United States, 167 U. S., 518; 42 Law. Ed. 260, the bill in equity alleged "that the effect of such inclosure was to exclude the United States and all other persons except the defendants, therefrom;" this illustrates the point raised by us, and we respectfully con-

tend that in order to make the indictment good in this case against petitioners, an allegation "that the effect of the act charged was to prevent and obstruct the United States and all other persons except the defendants" or some similar allegation, should be incorporated into this indictment.

We respectfully call the Court's attention to Section 4 of the Act, which is the penalty clause, which, in itself, points very clearly to the general intent of Congress in passing the entire Act. This section is as follows:

> "Any person violating any of the provisions hereof, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense." 23 Stat. 322; 35 Stat. 40.

The specification in this section "any person, whether owner, part owner, or agent" is, we admit, greatly confusing. However, persons violating the provisions of the law by acts, which, it is our contention, this legislation covers, would only do so as owner or pretended owner of the vast grazing areas which they would, by committing the prohibited acts, attempt to preserve. A person fencing a tract of government land against the provisions of Section 1 of the Act, would do so naturally as the pretended owner of the government land inclosed.

A person committing an act of violence against a single individual, who was going on the public land to make settlement, would naturally do so as the owner or pretended owner of the land which the homesteader desired to file on. Any person placing an obstruction, whereby the public was prevented from having and enjoying free passage and transit over his grazing land, would do so as the owner, or pretended owner of the grazing land to which entrance was obstructed, and in construing the act in accordance with what we deem to be the intention of Congress, Section 4 is in perfect accord, and no ambiguity exists. However, if we attempt to apply the provisions of this penalty clause to these petitioners as they are charged under the indictment, the result is ridiculous. The only possible thing we could be charged to be the owners of would be the deadly weapons, and we respectfully submit that it is too plain for argument that Congress did not use the words "owner, part owner, or agent" in this manner.

The petitioners are then charged in this indictment with a single assault with a deadly weapon upon a certain day upon certain individuals, whereby such individuals were prevented and obstructed from passing over the public lands. There is no charge, no inference and no conclusion to be drawn from the indictment that the assault would affect, could affect, or was designed to

affect any other person or thing in the world except the three men mentioned in the indictment. There is absolutely nothing in the indictment from which it could be inferred or imagined that the act charged would, could or was intended to stand as an obstruction to the free passage and transit of the public over or through the public lands; it can not be inferred or concluded from the wording of the indictment that the persons assaulted were passing through the public lands to make settlement or establish residence. The indictment, not containing any allegations in reference to the above matters, does not come within the provisions or prohibitions of Section 3 of the Act of February 25th, 1885, and therefore does not state a public offense unless that portion of the Act, under which the Government has attempted to charge petitioners, is to be construed to read: "or shall prevent or obstruct *any person* from having and enjoying free passage and transit over or through the public lands." We respectfully submit that such an interpretation is not included within the terms of the Act, was not intended by Congress, and to declare it to read as above suggested would be judicial legislation.

We respectfully submit that the Honorable Circuit Court of Appeals was in error in holding that the indictment stated a public offense against your petitioners.

SPECIFICATION OF ERROR NO. II.

The Honorable Circuit Court of Appeals was in error in holding that portion of Section 3 of the Act in question, under which petitioners were charged, to be constitutional, for the reason that said Court construed said portion of Section 3, under which your petitioners were convicted, as prohibiting every act of personal violence which obstructed the free passage and transit of an individual over the public lands, thus bringing the act charged in the indictment herein, within the scope and meaning of said portion of Section 3, and if this is the proper construction of that portion of Section 3 in question, then this part of Section 3 is unconstitutional and void for the reason that it includes within its scope acts of personal violence not directed against or affecting the territory or other property belonging to the United States, and the constitutional can not be separated from the unconstitutional part of said section without adding qualifying words, phrases, or terms.

This question also goes to the sufficiency of the indictment to state a public offense.

Our contention is that if the construction placed upon this portion of Section 3, under which your petitioners are indicted, is correct, and it prohibits and makes punishable a single act of violence directed against

a particular individual, then Congress has not the constitutional authority to pass such an act.

That the Congress of the United States is limited in its powers to enact legislation to those only which are given and conferred by the constitution, is a settled matter of law, we take it, and no argument is needed on this point. Keller vs. United States 213 U. S. 138; 53 Law Ed. 737.

Any authority which Congress may have to pass the Act in question, must be found in Article IV, Section 3, of the Constitution.

> "Congress shall have the power to dispose of and make all necessary rules and regulations respecting the territory or other property belonging to the United States."

Now; as we understand this section of the Constitution, it is extremely broad, and of necessity must grant to Congress the power to pass any legislation which in any manner respects or affects the property of the United States, or, to be specific, the public lands, that is, against any injury to or unlawful claim to the land itself. However, as broad as this section of the Constitution is, yet it is by its very terms limited to any legislation "respecting the territory or other property belonging to the United States;" as applied to the legislation here in question, it must operate to protect the land itself, or the right of the Government as proprietor of the land itself, and

we respectfully submit that this section of the Constitution does not grant to Congress the power to make legislation prescribing rules of personal conduct, limiting the personal actions of a person upon the public domain, unless such rules do, as a matter of fact, protect the public land itself from injury or unlawful claim, or protect the United States Government in its right as proprietor of the land itself.

> "While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, although it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection." Camfield v. United States, 167, U. S. 518; 42 Law Ed. 260.

We respectfully call the Court's attention to the above expression "so long as such power is directed solely to its own protection." This precisely states our position.

> "Full power is given Congress to make all needful rules and regulations respecting the territory or other property of the United States. This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale and to protect them from taxation." Pollard et al., vs. Hagan, et al., 3 How. 212; 11 Law. Ed. 565.

"But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limitations." Kansas v. Colo. 206 U. S. 46; 51 Law Ed. 956 at 971.

If the portion of Section 3 of the Act of February 25th, 1885, under which petitioners are indicted, has been correctly construed by the Honorable Circuit Court of Appeals, it prohibits two classes of acts. First: It would prohibit any act of personal violence that would obstruct an individual from free transit, who was passing through the public lands to file on a mining claim, to cut timber under permit from the United States Government, to file on a power site, or to exercise any of his rights under the pre-emption laws of the United States. It is quite apparent that an act of violence of this nature would affect the United States Government as proprietor, as it would tend to obstruct not only the individual from exercising rights granted to him by the United States Government, but it would also tend to obstruct the United States, as proprietor, from disposing of the timber, power site, or lands, and thus we take it, that if this portion of the act were limited to apply only to such acts of violence, it would be within the grant of powers conferred by the Constitution.

But, on the other hand, this section of the Act, as

construed, would also prohibit an act of personal violence committed upon a particular individual, whereby such individual was obstructed while passing through the public lands for the purpose of fishing, hunting, for pleasure, or bent on an errand of personal business. The obstruction to the transit of such individual, would in no way, shape, or form affect the land itself, or the United States as proprietor, and would be absolutely nothing more than an act of personal violence, which would obstruct the person against whom it was directed, in the exercise of one of his inalienable rights. That is, to travel freely when and where he chooses.

The Act of Congress, as construed by the Honorable Circuit Court, expressly includes within the same general term, "obstruct or prevent free passage and transit," unlawful acts within the constitutional and those within the unconstitutional class, those acts which affect the Government as proprietor, or the land itself, in the constitutional, and the acts which are merely personal in their nature, and have nothing to do with the Government, or the land in the unconstitutional. The part of the statute which is applicable to the former class of acts can not be separated from that applicable to the other class, so that each may be read and may stand by itself, because both classes are embodied in the general words, "obstruct or prevent free passage or transit," and are

included in a single declaration of this section of the Act. The unconstitutional prohibition can not be elimiated from the law by striking out or disregarding any words or clauses of the Act. That result can be attained only by the introduction by the Court into the Statute words of limitation which would expressly restrict the general terms "obstruct or prevent free passage or transit" to acts which would affect the "territory or other property belonging to the United States." Such a limitation, we submit, under such a construction of Section 3 of the Act, would exclude from the operation of the Act by far the larger number of acts which would prevent and obstruct free passage and transit, as there are a much greater number of acts committed upon the public lands which obstruct certain individuals, which acts do not in any manner affect the territory or property of the United States, than there are acts of this nature which do affect the property or territory of the United States.

Now, while we admit that where a statute is constitutional in part, and unconstitutional in part, the former part in proper cases may be sustained, while the latter part fails. Still, we respectfully submit, there are two conditions necessary to such a result. First: That the constitutional part and the unconstitutional part are capable of separation so that each may be read and stand by itself.

Baldwin v. Franks, 120 U. S. 678; 30 Law. Ed. 766.

Second: That the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part and to give effect to the former only.

Allen v. Louisiana, 103 U. S. 80, 84; 26 L. Ed. 318.

United States v. Reese, 92 U. S. 214, 218, 221; 23 L. Ed. 563.

The Trade-Mark Cases, 100 U. S. 82, 99; 25 L. Ed. 550.

United States v. Harris, 106 U. S. 629, 641, 642; 1 Sup. Ct. 601; 27 L. Ed. 290.

Virginia Coupon Cases (Poindexter v. Greenhow) 114 U. S. 270, 305; 5 Sup. Ct. 903, 962; 29 L. Ed. 185.

Spraigue v. Thompson, 118 U. S. 90, 94; 6 Sup. Ct. 988; 30 L. Ed. 115.

Income Tax Cases (Pollock v. Farmers' Loan & Trust Co.) 158 U. S. 601, 636; 15 Sup. Ct. 912; 39 L. Ed. 1108.

Cella Commission Co. v. Bohlinger, 78 C. C. A. 467, 471; 147 Fed. 419, 423; 8 L. R. A. (N. S.) 537; Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507; 34 South. 544, 555; 62 L. R. A. 407; 95 Am. St. Rep. 476.

The conditions can not, in this case, be complied with, and the entire portion of Section 3, "No person by force, threats, intimidation, or by any fencing or inclosing or any other unlawful means shall prevent or obstruct

the free passage or transit over or through the public lands," must be held to be unconstitutional if such portion of Section 3 is construed to apply to an assault with a deadly weapon, committed upon the public land, which prevents and obstructs an individual from having and enjoying free passage and transit over the public lands, as is charged in this indictment.

SPECIFICATION OF ERROR NO. III.

The Honorable Circuit Court of Appeals was in error in holding that portion of Section 3 of the Act in question, under which petitioners were convicted, to be constitutional, for the reason that said Court construed said portion of Section 3, under which petitioners were convicted, as prohibiting every act of personal violence which obstructed the free passage and transit of an individual over the public lands, and thus bringing the act charged in the indictment herein, within the scope and meaning of said portion of Section 3, and if this is the proper construction of that portion of Section 3 in question, then this part of Section 3 is unconstitutional and void for the reason that it usurps and infringes upon the police powers of the State, in this, that with such a construction placed upon the portion of the Act in question, it prohibits acts which obstruct an individual in his right to travel freely when and where he chooses, and this right is one of the inalienable rights of man, to be pro-

tected by the States alone in the exercise of their police power.

As mentioned in Specification No. II, with this construction upon the Act, the Act would punish an act of violence committed upon an individual, whereby such individual was obstructed from passage through the public lands for the purpose of hunting, fishing, traveling on personal business, or merely for pleasure; it would confer jurisdiction upon the Federal Courts to punish any and all assaults, including murder, committed upon the public domain, for all of these certainly as a matter of course, would prevent the individual assaulted or murdered from having and enjoying free passage and transit over and through the public lands, and the United States Government has assumed an exclusive police supervision over the public domain, and has made practically every State Statute looking to the preservation and keeping the peace on the public domain unenforceable. We have in the Western and public land states, many range and live stock laws, which were designed, and which, for years, have protected and upheld the live stock industries of the State and preserved the tranquility of the ranges. A great mass of territory lying within the boundaries of the State of Idaho, as well as other of the Western States, is unoccupied, public land. These States are the great growers of live stock of the United States,

and the raising of this stock is accomplished principally by the use of the range on the public unoccupied land of the United States. The States, in the exercise of their police powers, have legislated to regulate these industries, and as these industries are conducted on the unoccupied public lands, it follows, of course, that all this legislation itself, and its enforceent prevents and obstructs certain persons from having and enjoying free passage and transit through the public domain.

Any peace officer of the State of Idaho, arresting anyone charged with any offense, or enforcing a State law on the public lands, could be charged in the very identical language of this indictment, and further, under the construction sought for by respondent, he could be convicted and punished. Section 1908, Idaho Compiled Statutes is as follows:

> "Herding Within Two-Mile Limit Prohibited. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within 2 miles of the dwelling house of the owner or owners of such possessory claim."

This section was held constitutional and the urgent necessities for passing it were reviewed by this Court in the case of Bacon v. Walker, 204 U. S. 311. The Act itself prevents free passage and transit over the

public lands; the courts of this State and its peace officers are violating the provisions of the Federal Act in question, as construed by the Honorable Circuit Court, in enforcing this State law; the homesteader who admonishes the sheep man that he will hail him into court in case of violation of its provisions, is preventing free passage and transit by threats and intimidation.

Section 8333, Idaho Compiled Statutes:

> "Grazing Sheep on Cattle Range. Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

This Statute has been held constitutional, and a legitimate exercise of the police powers of the State, and not in conflict with the Federal Act in question, in Omaechevarria v. Idaho, 246 U. S. 343, yet under the construction sought by the Government and sustained by the Circuit Court of Appeals, it prevents free passage and transit over the public lands. The State peace officers, who under their authority, prevent violations of this statute by making arrests, and in some cases preventing a violation of this

state statute, with force, and intimidation, directly violate the terms of this Federal Act in question, and can be charged under the very terms of the indictment in this case.

The range rider who admonishes the sheep man that he is entering upon the cattle range and will be arrested if he persists, is guilty of preventing and obstructing free passage and transit over the public lands by threats and intimidation.

Sections 1861 and 1862 Idaho Compiled Statutes:

"1861. Transportation of sheep from quarantined area. It shall be unlawful for any railroad company or other transportation company to receive for transportation or transport from the quarantined area of this state into or through an unquarantined area of this state, or receive for transportation or transport within the quarantined area of this state any sheep, or as a connecting carrier knowingly receive without the quarantined area, sheep from the quarantined area, and transport the same within the state, except as hereinafter provided; nor shall any person, company or corporation deliver for such transportation to any railroad company or other transportation company, any sheep from the quarantined area, except as hereinafter provided; nor shall any person, company or corporation drive on foot or cause to be driven on foot, or transport in private conveyances or otherwise move within the quarantined area any sheep except as hereinafter provided; and the bureau shall make and promulgate rules and regulations which shall permit and govern the inspection

dipping, treatment, certification, handling and method and manner of delivery and shipment or other movevent of sheep within a quarantined area of this state. The bureau shall file notice of such rules and regulations in the manner provided in section 1860 for notice of establishment of quarantine."

"1862 Movement of sheep from quarantined area. It shall be unlawful to move sheep from a quarantined area of the state in any manner whatsoever, into an unquarantined area of the state, or for connecting carriers to receive sheep of the quarantined area at a point outside of the quarantined area and transport the same within the state,except in accordance with the rules and regulations of the bureau. It shall be unlawful to move any sheep within a quarantined area of the state except in accordance with the rules and regulations of the bureau."

These sections, we respectfully submit, are a legitimate exercise of the police powers of the state, yet these laws themselves and their enforcement directly and with the sole purpose in view, prevent and obstruct these animals from free passage and transit over or through the public lands.

The communities of the Western States derive their water supplies from springs and small streams in the mountains on the public lands; the crossing or free passage and transit over these water sheds by large droves of stock pollute the water. Yet, if the Act is given the construction placed upon it by the Honorable Cir-

cuit Court, the states are powerless to protect these communities.

We respectfully call the Court's attention to the fact that if this Federal Act in question prohibits every act of force, threats, intimidation or violence upon an individual, which obstructs the individual from free passage and transit over the public lands, every murder assault, highway robbery committed upon the public domain is punishable under the Federal Act; every peace officer of the State of Idaho, who arrests a man upon the public domain, or enforces the range and live stock laws upon the public domain, can be charged in the very identical language of this indictment, and furthermore, the states can only make police legislation applicable to patented lands, and must turn the vast area of public lands over to the government to police, as completely as though these lands lay in the District of Columbia.

Since, under this construction, the Act in question prohibits the acts above mentioned, it is an unconstitutional usurpation of the police powers of the State, and its application to these acts can not be eliminated without qualifying words or terms, and for the reasons stated in Specification of Error No. II, this can not be done.

To illustrate the point, the indictment charges that petitioners did "make an assault with firearms, the same

consisting of guns, pistols and revolvers, a more particular description of which is to this grand jury unknown." Now there can be no question that the trial court would not have jurisdiction over the crime of assault with a deadly weapon, which is a felony under the state law.

> "A court that does not have jurisdiction of a major offense cannot carve out of such offense one of less grade and try that, * * * *"

> "The charging part of the information upon which petitioner was convicted, a copy of which information is attached to petition, sets out that petitioner on or about the first day of June, 1889, within the Indian Country, at a place under the exclusive and sole jurisdiction of the United States, unlawfully did then and there assault the person of one R. H. Bousted, a citizen of the United States * * * * with force and arms, with a revolving pistol, a deadly weapon, commonly called a revolver, loaded or charged with cartridges, containing gunpowder and leaden balls, and of the calibre of No. 45, in the defendant's hands then and there held and discharged divers times at and against the said complainant * * * bodily injury, without provocation and in an abandoned manner" etc. . . . .

> "In this case the offense of which petitioner was convicted is the minor one, and that of assault with intent to kill is the major one. The court at Muskogee had no jurisdiction of the major offense. Therefore, the petitioner, by his conviction and sentence there, is not protected against another trial upon the same facts for an assault to kill, by a court having jurisdiction of

such offense. When such a state exists, a court cannot carve out of the higher offense, of which it has no jurisdiction, one of less grade, and try the party for it, as this is unjust to the public, and it may be unjust to a party charged, and therefore it is against the policy and humanity of the law. To authorize it to do so, it must have jurisdiction of both offenses and at the trial where the party is found guilty of the one of less grade, the charge must be so made as upon that indictment the party might be found guilty of the major offense. The misdemeanor in this case is clearly merged in the felony, and the courts must always try for the crime committed." Ex. parte Brown, Circuit Court, W. D. Arkansas, 40 Fed. 81.

SPECIFICATION OF ERROR NO. IV.

The Honorable Circuit Court of Appeals was in error in holding that the indictment stated an offense against your petitioners without negativing the proviso contained in said Section 3 of the Act.

We then contend further that if the Government wishes to rely upon this Act of Congress as the foundation for its indictment herein filed, and take the Act of Congress as the statute creating it, then it must frame its indictment upon the statute, and that it must be so framed that it will distinctly appear from the face of the indictment itself or it will fail in stating an offense against the law, and in order that it shall so appear, the pleader must specifically set forth the facts consti-

tuting the same so that the Court may look upon the face of the indictment and see if the facts stated therein, if true, show that the offense has been committed and nothing be left to implication or intendment.

Section 3 of the Act in question contains this proviso:

> "Provided, This section shall not be held to affect the right or title of persons who have gone upon, improved or occupied the said lands under the land laws of the United States, claiming title thereto in good faith."

The indictment has not negatived this exception, and this is necessary in order to charge all the elements of the offense as set out in the statute creating it.

> "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is ommitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception" . . . . "Cases have also arisen and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and

the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute." United States v. Cook, 84 U. S. 168; 21 L. Ed. 538.

"Although sometimes called 'crude' or 'artificial,' yet 'in point of fact it serves to symbolize a germinal point of discrimination,' which is this: Does the statute create a 'general' offense, or one limited to particular persons or conditions? In the first case the exception need not be negatived, and in the latter it must be. For instance, a statute prohibits, first, all sales of alcohol, and then excepts from the prohibition sales for medicinal purposes. Here the evident purpose of the statute is to prohibit the sale of alcohol generally, and the permitted exception need not be negatived in an item charging a violation thereof. On the contrary, where a statute prohibits the sale of intoxicating liquor without a license, or by any one except a person duly licensed therefore, it is manifest that the statute was not passed for the purpose of preventing the sale of such liquor generally, but only under particular conditions or circumstances, namely without a license. And therefore an indictment charging a person with a violation of statute must allege that the sale was made without a license." Nelson v. United States, 30 Fed. 112.

"The determination of this question does not depend on the mere structure of the statute. If it be clear that an act is only to become a crime when executed by persons of a certain class, or under particular conditions, then this class or those conditions must be set out in the indictment, no matter in what part of the statute they may be expressed."

"At the passage of the act of 1885 the public or a large class thereof were permitted and authorized by law to go upon and inclose portions of the public lands, with a view of acquiring title thereto under the pre-emption, homestead and other acts of Congress. An inclosure made under such circumstances is made under 'an asserted right' to the land, and 'with a view to entry thereto at the proper land office' under the law applicable thereto. Then comes this act, and prohibits and makes criminal the making or maintaining of any inclosure on the public lands under any circumstances. This, in my judgment, leaves the matter in a similar condition to that of the sale of spirituous liquors, where the same is prohibited and punishable if done without a license. An indictment for such a crime must charge that the sale was made without a license; and so here, an indictment charging a person with making an illegal inclosure on the public lands should allege that the act was done without the presence of the conditions or circumstances which justify or license it."

"Neither is the crime defined by the act a 'general one.' The crime it defines—an inclosure of the public lands—is limited to particular persons; such as have 'no claim or color of title' to the land inclosed, 'made or acquired in good faith;' or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office, under the general laws of the United States." United States v. Felderward, 36 Fed. 490.

"The indictment is fatally defective in not charging that at the time alleged unlawful enclosure was made or erected the defendant or other person who constructed the same had no

claim or color of title to any of the public land inclosed, 'made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States.'' United States v. Churchill, 101 Fed. 443.

''However, it is made incumbent upon the government to show that the accused had no claim or color of title to the lands, made or acquired in good faith nor an asserted right thereto by or under claim made in good faith with a view to entry thereof in the proper land office under the general laws of the United States at the time. The Government is required to allege as much.'' United States v. Churchill (D. C.) 101 Fed. 443, ''And, being required to allege it, it is also required to prove it.'' Lillis v. United States, 190 Fed. 530. United States v. Wood, 159 Fed. 187.

SPECIFICATION OF ERROR NO. V.

The Government's Exhibits, as shown on Pages 27 to 29 of the Transcript of the Record, should not have been admitted in evidence for the reason that they constituted a material variance with the allegations in the indictment, and prejudicial to the rights of the petitioners. The indictment specifies:

''Certain public, unoccupied lands of the United States of America, to-wit: Those lands which are and will be included in Townships Seven (7) and Eight (8) North Range Twenty-two (22) East Boise Meridian.''

A direct allegation, we submit, that Townships

Seven and Eight are unoccupied public lands. This allegation is a material one, as material as the venue, for it is the very gist of the offense charged. The petitioners are then advised fairly and squarely that they are to be tried for an offense, the real gist of which is that Sections Seven and Eight are public unoccupied lands of the United States. The petitioners then prepare to meet this issue. Upon the trial they are then confronted with the exhibits objected to, which show not that Townships Seven and Eight are unoccupied public lands, but on the contrary are patented lands, desert entries, homestead entries, state school lands, forest reserve, and public lands, each in some cases requiring a different defense and different testimony. We respectfully submit that this is so clearly prejudicial to the rights of the petitioners as to need no further argument. If this is to be permitted, why allege Townships Seven and Eight? The results would be the same to allege that the State of Idaho was unoccupied public lands and make proof of the fact by putting in evidence a map of the State of Idaho, wherein some of the sections therein appeared as public land.

> "However guilty might be the prisoner, it would be impossible to enforce the law with such a variance of pleading and proof as this. It being necessary to prove the substance of this issue, it follows that any departure from the sub-

stance in the evidence produced must be fatal, constituting what is termed in the law, a variance * * * If the allegations contain a matter of description and is not proved as laid, it is a variance and is fatal. United States v. Denicke, 36; Fed. 407. United States v. White, 110 Fed. 598.

SPECIFICATION OF ERROR NO. VI.

The evidence fails to show or prove petitioners, or either of them, guilty of any crime.

Now it necessarily follows, as an elementary principle of criminal law, that the accused is assumed to be innocent until his guilt has been proven beyond reasonable doubt, and the demurrer to the evidence applied to the petitioners, both individually and jointly, and we respectfully submit that from a close perusal of the testimony which is contained in the bill of exceptions in the Transcript of the Record of this case, and which is the agreed statement of all testimony material to the issue, that there is no evidence to show that petitioner Rudolph Lehman ever committed an act against the persons of Pete Iphar, Bert Etchart or John Mallea, was not even present at the time of the trouble when Pete Iphar was shot, but was only at the place of the shooting after it had occurred (Page 15 Transcript of the Record.) There is not one iota of evidence anywhere in the record to show that Rudolph Lehman, as charged in the indict-

ment, prevented or obstructed the free passage over or through the public domain of Pete Iphar, Bert Etchart or John Mallea. It is true the evidence shows he was present after the shooting, (Transcript of the Record Pages 14 and 15) but that would not tend to prove him guilty, and if he did no act himself to prevent the transit, as charged in the indictment, then the Government should have been non-suited as to him. The same applies to petitioner, E. J. Bates, although we find him present at several times, and having conversation with the said Pete Iphar, Bert Etchart and John Mallea, still, at the actual assault alleged in the indictment on the 25th day of August, 1919, when the crime is alleged to have been committed, and on which the Government bases its indictment when the shooting took place, and Pete Iphar was shot, E. J. Bates was not present. (Page 14 Transcript of the Record). He is not charged under the statute with aiding or abetting, so we submit that the evidence is entirely insufficient as to petitioner, E. J. Bates.

> "Whether or not Hanley aided, abetted, counselled, advised or assisted the administrator of the estate of French or anybody else within three years, next preceeding the indictment in the maintenance of the alleged inclosure was beside the charge upon which the defendant was on trial. It was his own alleged acts in unlawfully excluding others from the government lands specified in the indictment for which he

was being tried." Hanley v. United States, 186 Fed. 711.

Now as to petitioner Charles Warren, the only thing that we can find in the record in reference to him, is that he was present after the shooting (Pages 19 and 20 Transcript of the Record). Anyone hearing a shot might ride up, but the fact of their presence would not lead to a presumption of guilt as contemplated by law, to prove a man guilty beyond a reasonable doubt.

That leaves the petitioners Emmett Donahue and Charles McKelvey. The same argument that we apply to Rudolph Lehman, E. J. Bates and Charles Warren does not apply to them. As it appears from the evidence that Emmett Donahue and Charles McKelvey, petitioners in the case, rode into the camp of Pete Iphar, Bert Etchart and John Mallea and told them to throw up their hands and started shooting immediately, with rifles, pistols and revolvers, (Pages 13 and 14 Transcript of the Record) and as to these petitioners, we contend that the evidence stands undisputed as set forth on page 14 of the transcript of the record and it is not shown that it was the purpose of such shooting of Pete Iphar, to prevent or obstruct free passage over the public domain or that at the time of such shooting Pete Iphar, Bert Etchart or John Mallea were endeavoring to pass over the public domain, but the evidence shows that they were in camp (Page 14 Tran-

script of the Record), so taking the evidence as a whole as against these petitioners individually, where they were individually charged with the acts, as set out in the indictment, not as "owner, part owner or agent, or with aiding, abetting, counselling, advising or assisting" that the evidence is insufficient upon which to base a conviction.

Hanley v. United States, 186 Fed. 711.

We submit that there is no place in the evidence that it is shown that the parties charged to have been obstructed, that is, Pete Iphar, Bert Etchart, and John Mallea, were ever obstructed from going any place they desired to go. There was no objection made to them going anywhere they wished to go. Pete Iphar testified on cross-examination, (Page 16 of the Transcript of the Record) in reply to the following question:

"Q. The only objection which was made to you going anywhere, was to the sheep going, was it not?

"A. That is all."

SPECIFICATION OF ERROR NO. VII.

The Honorable Circuit Court of Appeals erred in holding that the trial court acted within its jurisdiction in passing sentence upon your petitioners, for the reason that Section 4, the penalty section of the Act in question, makes no provision for the punishment of anyone except

one acting as "owner, part owner or agent," and the indictment does not charge and the proof does not even remotely tend to show that any or either of your petitioners were acting in the capacity of owner, part owner or agent.

We respectfully submit that the cause should be reversed and remanded and the indictment quashed, or a new trial granted.

Respectfully submitted,

Ralph M. Adair

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Residence: Blackfoot, Idaho.

Edgar A. Clark

Nolan D. Clark

Counsel for Petitioners
Residence, Mackay, Idaho.

Service of the foregoing Brief, by receipt of three true copies thereof, admitted this_____day of_____,1922.

_____
Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

CHARLES MCKELVEY, CHARLES WARREN, E. J. BATES *et al.*, petitioners, v. THE UNITED STATES OF AMERICA. } No. 106.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The petitioners were tried and convicted in the United States District Court for the district of Idaho under an indictment charging a violation of section 3 of the act of February 25, 1885, c. 149, 23 Stat. 322 (Comp. Stats. Ann. 1916, sec. 4999).

That section is as follows:

> That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject

> to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto in good faith.

The specific offense charged was that the petitioners by force, threats, intimidation, and other unlawful means, prevented certain named persons from having and enjoying free passage over and through public lands of the United States.

The facts which gave rise to the indictment and which were developed by the evidence adduced at the trial concern actions of the petitioners in forbidding certain men in charge of sheep from proceeding over public lands of the United States near Mackay, Idaho, and in forcing them to take the sheep by another way. In the accomplishment of this purpose the petitioners made threats, a demonstration of firearms, and went to the extent of discharging firearms at the men in charge of the sheep, wounding one of them.

Petitioners' brief sets forth the evidence in considerable detail and it is unnecessary to extend it here.

After conviction and sentence, the petitioners sued out a writ of error from the Circuit Court of Appeals. That court affirmed the judgment of conviction. R. 52–57; 273 Fed. 410. The case is here by virtue of the allowance of certiorari by this court.

PROPOSITIONS.

The petitioners' attack, in the main, is on the scope of the act and its constitutionality. To meet the propositions advanced by them and to support the judgment of the courts below, we submit that:

I. The act charged in the indictment and established by the evidence is within the purview and scope of the statute.

II. The statute is constitutional both in its scope and purpose.

III. There was no error in the proceedings prejudicial to the petitioners.

ARGUMENT.

I.

The act charged in the indictment and established by the evidence is within the purview and scope of the statute.

The first contention of petitioners is that the indictment in essence charges only an attack upon the sheepmen. Manifestly, this is not true. The indictment charged that the petitioners "did willfully and unlawfully by means of force, threats, intimidation, and other unlawful means prevent and obstruct certain persons * * * from having and enjoying free passage over and through certain public, unoccupied lands of the United States * * *."

Then follows a recital of the acts by which the petitioners accomplished this, and an averment that the purpose thereof was to prevent and obstruct the persons specified from passing over and through the

public lands, and that that result was achieved. (R. 2.)

Even a casual reading of the indictment demonstrates that a violation of section 3 of the act of February 25, 1885, is charged. The fundamental error in petitioners' contention is that they take the incident (the means by which the violation of the statute was accomplished) and confuse it with, or substitute it for, the principal, the obstruction of free passage over the public lands.

Reasoning from this incorrect premise, petitioners say that the statute in its purpose and by its terms does not prohibit a single act of violence against a particular person even though the effect is to obstruct that person from having free transit over public lands; that the act legislates only against the maintenance of a public nuisance.

The logic of petitioners, if followed to the ultimate, would lead to this: In order to constitute a violation of the section it would be necessary to use more than once, the means employed to accomplish the result, since they say a single act of violence does not suffice; or that the section must be violated several times before they are guilty once.

In the instant case this would mean that the sheepman should have been wounded several times or prevented from passing more than once.

Now we say that it is immaterial how much or how often force or intimidation was used or how many threats were made, if free transit was

obstructed. If the single act sufficed, what more would be necessary? A single threat of murder is more apt to obstruct free transit than a series of less threatening actions.

Equally untenable is the proposition (petitioners' brief, p. 15) that the denial of *free transit* over the public lands must affect the public generally and not an individual alone. Certainly, if *one person* were obstructed there could not be free transit over the public lands.

The construction urged by petitioners ignores the plain language of the statute that "no person * * * shall prevent or obstruct free passage or transit over or through the public lands."

Petitioners seek to support their contention on this point by a comparison of the first part of the section with the second part. They urge that if the second part—that which denounces the obstruction of free passage over the public lands—is construed to prohibit a single act of violence, then it is superfluous and inconsistent with the provisions of the first portion which proscribes interference with or prevention of any person making entry or settlement.

We fail to see the force of this argument. By the first part, Congress designed to protect a particular class, viz, intending settlers and entrymen; by the second any and all persons who might have occasion to pass over the public lands. The fact that the first class might have been protected under the second portion of the statute does not create any inconsistency.

The section protects (1) peaceable entry or settlement and (2) peaceable progress over public lands.

As we have heretofore pointed out, the petitioners' argument proceeds upon the false assumption that the statute prohibits any act of violence upon the public domain. That is not so, except as that act is a means to an end. The aim and end of the statute was to prohibit obstruction to the exercise of rights or privileges with respect to public lands.

II.

The statute is constitutional both in its scope and purpose.

The constitutionality of this section of the act, as construed by the courts below, is assailed by petitioners:

(*a*) As including within its scope acts of violence not directed against or affecting the territory or other property of the United States. (Petitioners' brief, p. 23.)

(*b*) As usurping and infringing upon the police powers of the State. (Brief, p. 30.)

Petitioners' interpretation of the first ground of attack is that the power of Congress with respect to public lands is limited to legislation against any injury or unlawful claim to those lands. (Brief, p. 24.)

This is too narrow a limitation of the power of Congress.

If, as is conceded, Congress has power to punish for trespasses or injuries to public lands and to control

acquisition of rights therein, it undoubtedly has the power to safeguard the exercise of rights lawfully granted.

Petitioners admit the constitutionality of the first part of section 3 which protects persons in the exercise of the right to make settlement or entry because it is a regulation affecting a granted privilege. (Brief, p. 26.)

But the case at bar is not different in principle. Here, the persons obstructed by petitioners were driving sheep to public range. The privilege of free and common ranging on public lands has long been recognized by the United States. *Buford* v. *Houtz*, 133 U. S. 326; *Light* v. *United States*, 220 U. S. 523, 535. If the Government has power to permit free grazing—and there can be no question about that—then it has the undoubted power to protect those exercising that privilege. There is no difference so far as the constitutionality of the legislation is concerned, whether one exercises a granted right to cut down timber on the public lands or a recognized privilege to graze sheep.

Unquestionably Congress has power to withhold public lands not only from entry, settlement, or other acquisition, but also may prohibit entrance upon them. Thus, under the forest reserve act, all persons not within certain excepted classes may be excluded entirely from the reserves. *United States* v. *Grimaud*, 220 U. S. 506, 515. If public lands may be thus closed, certainly it is equally competent for Congress to provide that they be kept open.

It is interesting to note the lack of consistency in petitioners' argument. They apparently admit that if section 3 were construed to denounce a continued or permanent obstruction of free transit by the public generally, then it would be constitutional. If it be competent for Congress to legislate against such, it is equally competent to legislate against a lesser form of obstruction.

To the contention that the construction given the act impinges upon the police power of the State, we answer that in its capacity as sovereign the Government holds all the public lands of the Nation in trust for the people of the whole country, and while it has all the rights incident to proprietorship it also has power as a sovereign over the property belonging to it. *Light* v. *United States*, *supra*, at p. 537. One of those sovereign rights is the exercise of police power.

If, therefore, the enactment is within the constitutional competency of Congress, it would appear to be not objectionable because it might in some particulars infringe upon the ordinary police powers of the State. If it has that effect, the State power must yield to the Federal power.

The encroachment upon the police power of the State was urged against this act in *Camfield* v. *United States*, 167 U. S. 518. That case involved sections 1 and 2; but what was said concerning constitutionality is controlling here. In upholding the power of Congress to enact this legislation, this court said (p. 525):

> The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.

A like contention was presented in *Utah Light & Power Co.* v. *United States*, 243 U. S. 389, but was rejected, the court saying (p. 404) that congressional legislation has regulated in many particulars the use of the lands of the United States, "has prohibited and made punishable various acts calculated to be injurious to them or *to prevent their use in the way intended*," and that the States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned its validity has been upheld and its supremacy over State enactments sustained.

Now the plain purpose of the enactment under consideration was to keep open the public lands for the people and to protect all persons exercising rights or privileges thereon.

The argument of petitioners, as we have already pointed out, is that the legislation undertakes to regulate personal conduct. But the purpose was to regulate use, and safeguard rights and privileges with respect to public lands. It is only where personal conduct operates to interfere with the purpose of Congress that it falls within the purview of the statute. Strictly speaking, it is the thing accom-

plished by the conduct and not the conduct itself that is denounced by the statute.

The petitioners seem greatly disturbed for fear that the interpretation of the act for which we contend will interfere with the enforcement by the State of Idaho of its criminal laws. (Brief, pp. 31–36.)

We think this fear unfounded; the act is to be construed sensibly; it was not designed to interfere with the enforcement of criminal laws nor will it produce any such results. Compare *United States* v. *Kirby*, 7 Wall. 482.

The decision of the Circuit Court of Appeals in this case in not inconsistant with that of this court in *Omaechevarria* v. *Idaho*, 246 U. S. 343.

That case involved a law of Idaho prohibiting grazing of sheep upon a cattle range. It was contended (pp. 349, 350) that this law was in direct conflict with the closing clause of section 1 of the act of February 25, 1885. Section 3 was not passed upon, nor were its provisions urged against the Idaho law.

In sustaining the validity of the law, this court said that that law "makes no attempt to grant a right to use public lands," and "the State, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances" (p. 352).

Furthermore, attention was called to the fact that when the act of February 25, 1885, was passed,

Idaho had, by statute enacted about ten years previously, excluded sheep from portions of the public domain. The basis of the decision appears to have been that as Congress had not by express statute undertaken to regulate grazing upon public lands, the States might do so.

It will be noted that the Idaho statute does not attempt to forbid the *passage of sheep through a cattle range*. It forbids the herding, grazing, or pasturing of sheep thereon. The driving of sheep through forbidden territory and the occasional eating of grass as they go, is not herding or grazing within the meaning of the statute. *Phipps* v. *Grover*, 9 Idaho, 415; 75 Pac. 64.

It is clear, therefore, that the Idaho statute is not in conflict with section 3, as it does not prohibit free transit over or through public lands.

We invite the court's attention to what the Circuit Court of Appeals said concerning the *Omaechevarria case*. (R. 56; 273 Fed. 414, 415.)

What has just been said concerning the effect of the range law would apply to the Idaho "two mile limit law" upheld in *Bacon* v. *Walker*, 204 U. S. 311.

III.

There was no error in the proceedings prejudicial to the petitioners.

Under this head we treat briefly of several points made the subject of specifications of error by petitioners. (IV, V, VI, VII.)

It is said that the indictment was not good because it did not negative the proviso in section 3, which is:

> *Provided*, This section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied the said lands under the land laws of the United States, claiming title thereto, in good faith.

The proviso, however, is not a component part of the definition of the offense. It merely gives a rule of interpretation of the section and probably was inserted out of abundance of caution. The language of the section denouncing the obstruction of free passage over the public lands is entirely separable from the proviso, and the ingredients constituting the offense may be accurately defined without reference to the proviso. Therefore, it was not necessary to negative it. The proviso was a matter of defense. *United States* v. *Cook*, 17 Wall. 168, 173; *Ledbetter* v. *United States*, 170 U. S. 606, 611; *Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U. S. 1, 10.

Petitioners urge as error the admission in evidence of certain Government exhibits (R. 26, 29), township plats showing the status of the lands therein. It is argued that as the indictment charged the obstruction of transit over public lands, and as the plats showed some of the lands to be entered or patented lands, there was a fatal variance.

The indictment charged the obstruction of transit over "certain public, unoccupied lands * * * to wit, those lands which are and will be included in townships (describing them) * * *."

Now the lands, transit over which was obstructed, *were* included in the townships specified, and the fact that *all* the lands were not public lands does not make the admission of the plats error prejudicial to petitioners, nor is there any variance between indictment and proof. If transit was obstructed over any of these public lands, the fact that it was also obstructed over privately owned lands would not avail petitioners.

Regarding the assertion (Specification VI) that the evidence fails to prove petitioners, or any of them, guilty of any crime, it seems sufficient to say that the jury found them guilty, the trial court considered, on a motion in arrest of judgment, the same point as here urged, and the Court of Appeals said "the evidence amply sustains the verdict as against all who were convicted." (R. 56; 273 Fed. 415.) The evidence of Peter Iphar, at R. 14, clearly connects all the petitioners with the offense.

The last assignment concerning the construction of section 4 of the act is so faintly pressed and so obviously without merit that we pass it without discussion.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals was right and should be affirmed.

JAMES M. BECK,
Solicitor General.
H. L. UNDERWOOD,
Attorney.

NOVEMBER, 1922.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

CHARLES MCKELVEY, CHARLES WARREN, E. J. BATES, RUDOLPH LEHMAN, *and* EMMETT DONAHUE, petitioners, *v.* THE UNITED STATES OF AMERICA. } No. 382.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF THE UNITED STATES IN OPPOSITION.

The petitioners seek a review by this court of a judgment of the Circuit Court of Appeals for the Ninth Circuit which affirmed their conviction in the United States District Court for the district of Idaho of a violation of section 3 of the act of February 25, 1885, ch. 149, 23 Stat. 322 (Comp. Stats. Ann. 1916, sec. 4999).

Opinion of the Court of Appeals, 273 Fed. 410.

The acts which led to petitioners' indictment were these:

Certain men were driving sheep over public land on the east side of Big Lost River toward Mackay, Idaho. Some of the defendants met them, told them that the land in their course of travel was cattle

range, forbade them proceeding farther, and ordered them to take the sheep across the river. The herders halted the sheep, communicated with the owners, and were directed to continue on the way as originally planned. The next day the defendants came to the place where the herders were and, upon being informed of their intention to proceed, made threats and a display of firearms, ordered the herders to throw up their hands, discharged the firearms, and wounded one of the herders.

The basis of the petition appears to be the asserted unconstitutionality of the act of February 25, 1885; that the acts charged in the indictment are not within the scope of the statute; and because of an alleged conflict between the decisions of the Court of Appeals in this case and those of this court in others, particularly *Omaechevarria* v. *Idaho*, 246 U. S. 343.

However, if petitioners were so greatly concerned about the constitutionality of the act and were so anxious to have that question passed upon by this court, it was open to them to come here by direct writ of error under section 238 of the Judicial Code. Instead of doing so, they elected to take the entire case to the Circuit Court of Appeals.

Respecting the act, it is asserted that section 3 is unconstitutional as including within its scope prohibition of acts of personal violence not directed against the United States or its property, and further that it is a usurpation of the police power of the States. But there can be no serious contention

respecting the power of Congress to legislate with respect to its own property, and that power is not limited to acts the commission of which might result in pecuniary damage to the property, nor is the constitutionality of the act to be tested by such a standard.

The fundamental theory of the act was not that unlawful fences damaged the property of the United States, or that prohibiting free transit across the public lands resulted in loss to the United States in a financial way, but that the things which the act denounced interfered with a great and well-settled public purpose and policy; namely, keeping the public lands open and free from monopolization.

The constitutionality of the act of February 25, 1885, was assailed in *Camfield* v. *United States*, 167 U. S. 518. It is true that the court was there dealing particularly with sections 1 and 2, but in upholding the act as constitutional it was said (p. 525):

> The general government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.

Further, if as contended the act is to be construed only as prohibiting the assertion of an exclusive right in public lands by those not having any valid claim or color of title, the purpose of the act is frustrated by transactions such as in this case, for while these petitioners asserted no rights in the lands over

which they forbade the sheepmen to travel, yet the result of their acts was precisely the same as if they had, since the sheepmen were excluded from the lands. We confess our inability to perceive what difference it makes whether one asserts an unfounded claim to public lands and thereby excludes another, or whether he merely excludes without claiming.

It is claimed that the interpretation given section 3 interferes with the police power of the States. This is a contention often advanced to check action by federal authority. Such a contention was made in *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, against the power of the general government to regulate the use and occupancy of its lands within a State. It was disposed of in the opinion at pp. 404, 405.

But petitioners further assert that this case should be reviewed here because there is a conflict between the decision of the Court of Appeals and that of this court in *Omaechevarria* v. *Idaho, supra.* We fail to see such a conflict. That case involved a law of Idaho prohibiting the grazing of sheep upon a cattle range. It was asserted that the act was invalid, since it undertook to deal with the public domain. The court based its decision, sustaining the validity of the law, in part upon the fact that Congress had not legislated, and in the absence of such legislation the State might act (p. 346). It is a fact that this court considered section 1 of the act of February 25, 1885, but section 3 was not referred to. It was said, however, that the Idaho statute "makes no attempt to

grant a right to use the public lands," and that "the State, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances" (p. 352). We invite attention to the disposition of this point by the Court of Appeals, 273 Fed. 414, 415.

Petitioners make the point that their actions were not directed against the sheepmen but against the sheep; that as they did not forbid the *men* from going where they willed but only prevented the *sheep*, the statute was not violated. This contention is not original with petitioners. It was urged and rejected by the Circuit Court of Appeals for the Eighth Circuit in *Stoddard* v. *United States*, 214 Fed. 566, and *Mackay* v. *Uinta Development Co.*, 219 Fed. 116.

Petitioners have had the contentions they now make passed upon by two courts. There is nothing in this case of such importance as to justify a review here. We respectfully submit the petition should be denied.

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